82-1162

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE BANTA COMPANY, INC., BANTA DIVISION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether court enforcement of an NLRB order which predicates liability upon an allegation and legal theory that is not within the scope of the unfair labor practice complaint as litigated and prosecuted by the NLRB General Counsel and is specifically disavowed by the NLRB General Counsel (a) usurps the General Counsel's statutory independence under Section 3(d) of the NLRA, and (b) violates a respondent's due process rights in an unfair labor practice hearing?

Whether the National Labor Relations Act requires an employer to displace economic strikers who return to work during the course of an economic strike if other more senior economic strikers subsequently apply for reinstatement at the end of the strike and there is an insufficient number of jobs available?

Whether collectively negotiated contractual provisions which specifically set forth the method by which striking employees will be reinstated to available jobs after a strike constitute a valid contractual waiver of strikers' statutory reinstatement rights?

PARTIES TO THE PROCEEDING

Pursuant to Rule 21.1(b), in addition to the names of the parties in the caption on this petition, Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO, was an intervenor in the court below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, GEORGE BANTA COMPANY, INC., BANTA DIVISION,[1] petitions for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia entered in this case on August 13, 1982.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia is reported at 686 F.2d 10 (D.C. Cir. 1982), and is reproduced herein as Appendix A. The opinion of the National Labor Relations Board is reported at 256 N.L.R.B. 1197 (1981) and is reproduced herein as Appendix B.

[1] Pursuant to Rule 28.1 of the Rules of the Court, Petitioner states that it has no parent company, subsidiaries (except wholly-owned subsidiaries) or affiliates.

JURISDICTION

The Company sought review of the NLRB's decision in the Court of Appeals pursuant to the provisions of 29 U.S.C. § 160(e). The opinion and judgment of the Court of Appeals was entered on August 13, 1982. On September 13, 1982, the Company filed a timely Petition for Rehearing and suggestion for rehearing *en banc* which was denied on October 12, 1982 (Appendix C). This Petition for Certiorari was filed within 90 days of the denial of the Petition for Rehearing in accordance with the requirements of 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 3(d), 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 153(d), 158(a)(1), (3), and (5), and Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706. They are reproduced herein as Appendix D.

STATEMENT OF THE CASE

Petitioner, Banta Division of George Banta Company, Inc. ("Company") is engaged in the printing business and operates two production facilities in Menasha, Wisconsin. In 1977, at the time of the protracted labor dispute which gave rise to the alleged unfair labor practices in the instant case, the Company employed approximately 750 employees who were represented for collective bargaining purposes by two locals of the Graphic Arts International Union ("Union").[2] With the 1974 collective bargaining agreement set to expire on April 3, 1977, the Company in December 1976 advised the union of its desire to commence negotiations, stating "the Agreement must be significantly modified if we are . . . to be competitive" (R. Ex. 13, 44; Tr. 803, 1752, 53). Although numerous sessions were held prior to the expiration date of said agreements, including sessions involving a federal mediator, no agreement was reached and the Union voted to go on strike on April 4, 1977, the same day that the Company implemented its final offer.

As the strike dragged on through what would have been the Company's busiest season and as business conditions worsened, it became increasingly apparent that if and when the strike ended, operations could be resumed only on a greatly reduced basis. Moreover, anticipating that there might be more returning strikers than available positions, the Company sought to assure that the reinstated strikers would constitute a stable work force. Accordingly, the Company formulated a proposed preferential reinstatement system (PRS) prior to any striker returning to work (Tr. 1967; C.G. Ex. 10). After the Company had drafted the proposed PRS but before its presentation to the Union, a number of strikers made unconditional offers of reinstatement (Tr. 1106, 1967-68). By October 4, when the

[2] The two locals were 32B and 88L which merged to form Local 382, which continues to represent these employees in the same separate appropriate bargaining units (Appendix B, 5).

Company presented the proposed PRS to the Union, approximately 70 strikers had been reinstated to their former positions in chronological order of their offers of reinstatement (G.C. Ex. 51; Tr. 135, 1969-70, 2065, 2076, 2336). Following the Union's initial objections to the proposed PRS, the Company submitted a final offer, including a modified PRS for each bargaining unit. In an exchange of letters between the parties, the Union on October 10 stated:

> [W]e now reaffirm our acceptance of your total offer, including your Preferential Reinstatement System, to the full extent that the Preferential Reinstatement System does not violate the legal reinstatement rights of the striking employees. In our view, the law preserves the right to present to the NLRB any issue as to the legal reinstatement rights of striking employees.

By return messenger, the Company sent the following response:

> It is our understanding that while you have accepted our total offer, you have reserved the right to challenge the legality of all or portions of the Preferential Reinstatement System. This is, of course, your right and we do not construe your acceptance of our total offer as a waiver of any rights under the NLRA except to the extent such rights are waivable and have been waived by the language of the agreement.

By virtue of the Union's acceptance of the Company's total offer, including the PRS which was an integral part thereof,[3] the strike ended and production resumed to the extent permitted by business conditions.

After the strike ended, the Company utilized the negotiated PRS to determine which returning strikers would be reinstated to available positions. In accordance with the negotiated terms of the PRS, strikers who had been reinstated

[3] Virtually identical reinstatement systems were negotiated with the Union for each of the two bargaining units. The negotiated PRS for Local 88L is attached as Appendix E.

prior to the end of the strike were not bumped or removed from their positions even though more senior strikers made unconditional offers to return to work following the end of the strike. Those strikers who could not be reinstated immediately to their pre-strike positions were placed in any other job classification for which a vacancy existed, provided the employee was qualified for the position, or placed on a preferential hiring list for future vacancies to the same or substantially equivalent positions in chronological order of their unconditional offers of reinstatement (Appendix E; G.C. Exs. 21, 22). The negotiated PRS provided that "an employee reinstated pursuant to this Preferential Reinstatement System shall be paid the rate of the classification to which he is reinstated" (G.C. Ex. 21, 22).

Subsequently, on October 20, 1977, the Union filed unfair labor practice charges alleging that the Company's reinstatement of returning strikers in accordance with the terms of the negotiated PRS violated Sections 8(a)(1) and (3) of the NLRA. In the consolidated complaint that was subsequently issued, it was alleged that the Company violated Sections 8(a)(1) and (5) of the NLRA by unilaterally implementing its final contract offer on April 4, 1977 at a time when a bargaining impasse had not occurred and that the resulting strike was an unfair labor practice strike. Premised on this allegation, the consolidated complaint then alleged that the Company violated Sections 8(a)(1) and (3) of the NLRA by granting preferential reinstatement or preferential seniority rights to jobs and rates of pay only to those employees who abandoned the strike and who offered or who did return to work before the Union actually abandoned the strike (C.P. Ex. 2).

At the hearing, the NLRB General Counsel explicitly articulated the scope of the complaint which he was litigating and prosecuting. First, NLRB General Counsel alleged that the Company violated its duty to bargain by unilaterally implementing its final contract offer on April 4, 1977. Second, the NLRB

General Counsel alleged that since the striking employees enjoyed the status of unfair labor practice strikers due to the unilateral implementation of the final contract offer, the Company violated Section 8(a)(3) when, consistent with the PRS negotiated with the Union, it declined to displace strikers already reinstated in order to make room for more senior strikers who sought reinstatement at a later date (Tr. 698, 1213-14). The General Counsel did not allege a violation of the reinstatement rights of the strikers if the strike was found to have been economic in nature and, indeed, repeatedly reaffirmed that if the strike was an economic strike, the Company acted lawfully in its reinstatement of strikers (Tr. 702, 706, 714, 721, 1520, 1870). *See* Appendix F.

On October 15, 1979, the Administrative Law Judge issued his decision and recommended order in which he found that there was a bona fide impasse in negotiations on April 4, 1977, when the Company implemented its final offer and that "General Counsel has therefore failed to establish here that the Employer violated Sections 8(a)(5) and (1) of the Act as alleged and, consequently, that the ensuing six months strike was an unfair labor practice strike" (Appendix B, 52). Having so held, the ALJ nevertheless went on to find, contrary to the complaint as articulated and litigated by the NLRB General Counsel, that the Company's reinstatement of strikers in accordance with the terms of the negotiated PRS violated Sections 8(a)(1) and (3) of the NLRA. On July 16, 1981, a three-member panel of the NLRB affirmed certain rulings of the ALJ and adopted his recommended order in its entirety. The Board, however, specificially limited its affirmance of the ALJ's rulings, findings and conclusions through footnote 4 to its decision in which the Board held that the strikers' reinstatement rights were governed by the settlement stipulation.[4]

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[4] With respect to a prior unfair labor practice charge, the Company had entered into a settlement stipulation before any striker returned to work which provided that strikers would be reinstated to such positions *as were available* if the strikers made an unconditional offer to return to work within 60 days of the posting of the settlement notice. *See* C. P. Ex. 3.

On August 13, 1982, the Court of Appeals for the District of Columbia in an opinion written by Circuit Judge Abner Mikva denied the Company's petition to deny enforcement of the Board's order and granted the Board's cross-petition for enforcement. Although the D. C. Circuit noted that "the blame for much of the confusion in this case must be laid on the NLRB" and that "the Board's opinion in this case is hardly a model of clarity" (Appendix A, 27), the court nevertheless held that the "PRS was unlawful because it gave preferential reinstatement and seniority rights to one class of employees simply because those employees had abandoned the strike before the strike ended" (Appendix A, 27-28). The court, after acknowledging it had "some sympathy for Banta's frustration at the misleading comments of NLRB Counsel," nevertheless held that the General Counsel's "comments in their entirety hardly demonstrate a coherent theory of the case on which Banta could have relied comfortably" (Appendix A, 24). Finally, the court held that since "the parties had agreed to disagree about the legality of the PRS," there was no "clear and unmistakable waiver of statutory rights" (Appendix A, 19).

On September 13, 1982, the Company filed a petition for rehearing which was denied on October 12, 1982 (Appendix C). Petitioner now seeks review of the D. C. Circuit's decision in this Court.

REASONS FOR GRANTING THE WRIT

I. The D.C. Circuit's Decision That Unfair Practice Liability Can Be Predicated Upon An Allegation And Legal Theory That Is Not Within The Scope Of The Complaint As Articulated And Prosecuted By The NLRB General Counsel And Is Specifically Disavowed By The NLRB General Counsel Raises Important Questions Concerning The Statutory Independence Of The NLRB General Counsel And The Due Process Rights Of Respondents In NLRB Unfair Labor Practice Proceedings.

The clear holding of the decision of the court below is that unfair labor practice liability can be imposed on the basis of an allegation not within the scope of the complaint as prosecuted and litigated by the NLRB General Counsel[5] and, indeed, specifically disavowed by the NLRB General Counsel. Thus, the NLRB General Counsel's consistent and unequivocal position, stated repeatedly throughout the course of the hearing, was that the Company's implementation of the negotiated PRS violated the NLRA if, and only if, the April 4, 1977 strike was an unfair labor practice strike due to the absence of a bargaining impasse.[6] The NLRB General Counsel never alleged, never prosecuted, and specifically disavowed the charging party's contention that the Company's recall of strikers in accordance with the terms of the negotiated PRS was illegal if the strike was determined to be an economic strike. Consistent with the scope of the complaint as prosecuted by the NLRB General

[5] The terms "NLRB General Counsel" and "General Counsel" as used herein include the attorney who represented the NLRB General Counsel in the hearing in the instant case.

[6] Not surprisingly, approximately two-thirds of the lengthy hearing before the ALJ concerned whether the parties were at impasse on April 4, 1977 and whether the resulting strike was an economic or an unfair labor practice strike. Another portion of the hearing concerned the legality of the Company's discharge of six employees for alleged strike misconduct, a matter no longer at issue.

Counsel, whenever the Union attempted to advance the theory that the PRS as implemented violated the NLRA even absent impasse, he expressly disclaimed such a theory (Tr. 702, 706, 714, 1213-16, 1520, 1870, 2665). Further, as the ALJ acknowledged, the Company steadfastly objected to all attempts by the Union to expand the complaint independent of approval by the General Counsel (Tr. 1219). Significantly, when the NLRB General Counsel amended the complaint, he did so specifically and explicitly, and did not amend the complaint in such a manner as to alter his theory of liability repeatedly professed throughout the hearing. Quite simply, the NLRB General Counsel specifically disavowed any allegation that the PRS was illegal if the strike was an economic strike, repeatedly argued against such an allegation, refrained from amending the complaint to include such an allegation, and refrained from briefing such an allegation in his post-hearing brief.[7]

Contrary to the D.C. Circuit's holding, the numerous clear and explicit statements by the NLRB General Counsel concerning the scope of the complaint, which are excerpted in Appendix F, set forth a "coherent theory of the case" on which the Company reasonably relied in preparing and presenting its defense. The following is typical (Appendix F, 5-6):

> If this were an economic strike . . . we would not be alleging the Preferential Reinstatement System violated Section 8(a)(3). *** We are not attacking the validity of the Preferential Reinstatement System if it's found to have been an economic strike.

The following two exchanges between the NLRB General Counsel and the ALJ make absolutely clear the basis upon

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[7] In fact, the General Counsel's brief expressly acknowledged that a finding that the Company violated 8(a)(1) and (3) by its reinstatement of strikers was necessarily predicated on a finding that the Company violated 8(a)(5) through its unilateral implementation of its final contract offer. A finding that the strike was an unfair labor practice strike because a bargaining impasse did not exist on April 4, 1977, thus, was prerequisite to finding the PRS illegal under the complaint as litigated by the General Counsel. *See* brief of General Counsel at 2 n. 3.

which the NLRB General Counsel was seeking to impose unfair labor practice liability upon the Company (Appendix F, 5):

> [ALJ Itkin:] I only want the record to be very clear at this point, if there was any ambiguity, the General Counsel in effect acknowledges now as he has acknowledged earlier according to my notes that if this strike were found to be an economic strike and not an unfair labor practice strike, the PRS agreement as implemented would not be violative of Section 8(a)(3) of the Act.
>
> [Mr. Loomis:] That's correct.
>
> * * *
>
> [ALJ Itkin:] It is your position as representative of the General Counsel that the PRS system would neither be discriminatory *nor inherently discriminatory* as the case may be if this were an economic strike?
>
> [Mr. Loomis:] *Yes, Your Honor, That's Correct.* (Emphasis added.)

Despite these clear and unambiguous statements as to the scope of the complaint being litigated by the NLRB General Counsel, both the NLRB and the court below imposed unfair labor practice liability upon the Company, even though the ALJ specifically ruled that the strike was an economic strike. This case, then, raises in the most direct manner possible important questions concerning the statutory independence of the NLRB General Counsel and the related due process rights of respondents in unfair labor practice proceedings.[8]

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[8] The existence of the settlement stipulation does not in any way affect the legal analysis of the legal issues discussed in this section of the petition. The complaint never alleged, and the General Counsel never contended, either directly or indirectly, that the Company had violated any term of the settlement stipulation. In response to questions from the ALJ, the General Counsel stated that "General Counsel does not wish this to be viewed as a compliance proceeding, or quasi-compliance proceeding" (Appendix F, 2). While the ALJ, as

(Footnote continued on following page)

Under the NLRA, as amended by the Taft-Hartley Act in 1947, the NLRB General Counsel has the "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, *and in respect to the prosecution of such complaints before the Board...*" 29 U.S.C. § 153(d) (1976) (emphasis added). The NLRB General Counsel's exclusive authority in the prosecution of complaints and the presentation of legal theories upon which unfair labor practice liability is sought has been repeatedly emphasized and accepted by other federal appellate courts. *See, e.g., Royal Typewriter Co. v. NLRB,* 533 F.2d 1030, 1040 (8th Cir. 1976) ("It is the general rule that discretion to frame the issues in an unfair labor practice case rests in the General Counsel, who occupies a role not unlike that of a prosecutor"); *Local 282, IBT v. NLRB,* 339 F.2d 795, 799 (2d Cir. 1964) ("... since 1947 the General Counsel ... is *dominus litis;* the General Counsel has power to decide whether to issue a complaint ..., and to determine what its legal theory should be"); *McLeod v. Local 239, Teamsters,* 330 F.2d 108, 111 (2d Cir. 1964) (Section 3(d) "made it quite clear that the General Counsel was to have final authority at all times with respect to prosecuting unfair labor practices on behalf of the Board"); *Wellington Mill Division, Westpoint Mfg. Co. v. NLRB,* 330 F.2d 579 (4th Cir. 1964) ("The decision as to the scope of the complaint is for the General Counsel"). *See* H.R. Rep. No. 510, 80th Congress, 1st Sess., *reprinted in* 1947 U.S. Code Cong. & Ad. News 1135, 1143 ("The General Counsel is to

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(Footnote continued from preceding page)

the D.C. Circuit noted, did make reference in his interim ruling to the settlement stipulation, neither the Company nor the General Counsel proffered any evidence relating to the Company's compliance with the terms of the settlement stipulation. It is well-established that neither the Board nor any of its ALJs can inject issues in unfair labor practice proceedings that are not within the scope of the unfair labor practice complaint being prosecuted by the General Counsel. *See, e.g., NLRB v. Tamper, Inc.,* 522 F.2d 781, 789-90 (4th Cir. 1975).

have ... final authority to act ... independently of any direction, control, or review by the Board ... in respect to the issuance of complaints of unfair labor practices, and in respect of the prosectuion of such complaints before the Board").

The court below, however, held that decisions such as those just cited were "beside the point" because of what the D.C. Circuit considered to be "the adjudicatory responsibilities of the Board" (Appendix E, 25 n.17). While the Board unquestionably retains the adjudicatory responsibility for establishing policy under the NLRA, the Board is, nevertheless, bound by the General Counsel's determination of the scope of the complaint. While the Board may, in carrying out its statutory responsibilities, reject a theory of liability prosecuted by the General Counsel, it may not establish liability based on an allegation that goes beyond the scope of the complaint as prosecuted and litigated by the General Counsel. This is made clear by numerous appellate decisions holding that the Board may not entertain amendments to unfair labor practice complaints which the General Counsel opposes. *See, e.g., United Steelworkers of America v. NLRB,* 393 F.2d 661, 664 (D.C. Cir. 1968).

Moreover, the D.C. Circuit's decision that unfair labor practice liability can be predicated upon an allegation and legal theory specifically disavowed by the NLRB General Counsel directly affects the due process rights of respondents in unfair labor practice hearings. The well-established right of respondents to due process in such hearings would be rendered meaningless if the Board were able, as the D.C. Circuit holds, to adopt bases of liability not premised on allegations prosecuted and litigated by the General Counsel. As the Eighth Circuit observed in *Montgomery Ward Co. v. NLRB,* 385 F.2d 760, 763 (8th Cir. 1967), "evidence without a supporting allegation cannot serve as the basis of a determination of an unfair labor practice. It offends elemental concepts of due process to grant enforcement to a finding neither charged in the complaint nor

litigated at the hearing." Significantly, the D.C. Circuit did not cite to any case holding that full and fair litigation—consonant with a respondent's due process rights—can occur where the NLRB General Counsel specifically and repeatedly disavows and refuses to prosecute at the hearing the allegation upon which the NLRB and the court below ultimately based liability. *There are none.*

The Supreme Court should grant this writ in order to resolve the conflict between the D.C. Circuit in the instant case and other federal appellate courts concerning the statutory duties of the NLRB General Counsel under Section 3(d) of the NLRA in prosecuting unfair labor practice complaints and the related due process rights of respondents in unfair labor practice proceedings.

II. By Requiring An Employer To Displace Economic Strikers Who Returned To Work During The Course Of An Economic Strike With More Senior Strikers Who Subsequently Applied For Reinstatement At The End Of The Strike, The Decision Of The D.C. Circuit Runs Counter To The National Labor Policy Which Grants Employees The Right To Refrain From Strike Activity And Directly Conflicts With A Very Recent Decision Of The Seventh Circuit

Despite signing the negotiated Preferential Reinstatement System (PRS) which was an integral part of the collective bargaining agreement (Appendix E), the Union subsequently challenged the legality of the PRS because, under the PRS, employees who applied for reinstatement and were reinstated to work prior to the end of the strike were not subject to displacement by more senior strikers who applied for reinstatement following the end of the strike. In upholding the Board's determination that the Company's reinstatement of strikers pursuant to the negotiated PRS was illegal, the D.C. Circuit's decision requires employers now to displace economic strikers

who return to work during the course of a strike with more senior strikers who subsequently apply for reinstatement at the end of a strike where there are insufficient jobs available at the end of the strike to permit reinstatement of the entire complement of pre-strike employees. The D.C. Circuit's decision mandates such displacement, even if the employer and the union expressly negotiate an alternative method of reinstatement, a result directly counter to national labor policy.

The right to strike is, of course, protected by Section 7 of the NLRA, 29 U.S.C. § 157. Moreover, the Act prohibits an employer from discriminating against an employee for engaging in concerted activity, which includes the protected right to strike. 29 U.S.C. § 158(a)(1) and (3). The NLRA, however, also protects an employee's right to refrain from engaging in strike activity. Section 7 of the NLRA expressly provides that:

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all such activities*. . . .

29 U.S.C. § 157 (emphasis added). Thus, when certain striking employees applied for reinstatement prior to the end of the strike (and thereby exercised their statutory right to refrain from strike activity), the Company was under a statutory duty to reinstate them to their same or substantially equivalent jobs, if available. Since jobs were available, the Company reinstated these employees at the time they applied for reinstatement in accordance with their statutory rights.

Under the NLRA, striking employees simply do not lose or forfeit their status as "employees" entitled to the protections of the NLRA. 29 U.S.C. § 152(3). Retention of employee status under the NLRA, however, does not guarantee a striking employee the right to job reinstatement. During an "economic

strike" (a strike over wages, hours or terms and conditions of employment), an employer is free to hire permanent replacements and is under no obligation to displace such replacements when striking employees subsequently apply for reinstatement.[9] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). In *Mackay Radio*, this Court established an employer's right to replace economic strikers:

> Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although section 13 of the act, 29 U.S.C.A. § 163, provides, "Nothing in this Act [chapter] shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. *The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.*

304 U.S. at 345-46 (footnote omitted; emphasis added).

In the instant case, therefore, had the Company hired permanent replacements during the strike to fill all available positions, the striking employees would have had no right to displace anyone when they applied for reinstatement after the strike. The negotiated PRS simply provided strikers who returned to work prior to the end of the strike with the same protection from displacement at the end of the strike as would

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[9] Neither the NLRB nor the D.C. Circuit ever held that the strike at Banta was anything but an economic strike. In fact, the Administrative Law Judge to whom the matter was initially tried expressly found that the strike was an economic strike (Appendix B, 52).

be granted to persons hired during the strike as permanent replacements.[10]

The D.C. Circuit's decision is the first holding by a federal appellate court that the job rights of a former striker, reinstated during the course of a strike according to his or her statutory right to refrain from strike activity, are *inferior* to the job rights of a permanent replacement for a striker. The D.C. Circuit's decision requires the displacement of a reinstated striker if a more senior striker subsequently applies for reinstatement. Indeed, a fair reading of the decision would require the displacement of an employee who never struck by a more senior striker in the event that there were not enough jobs available for the entire pre-strike complement of employees following the strike. This holding not only is inherently destructive of an employee's right not to engage in a strike, a right co-equal with the right to strike, but also is in conflict with the basic rationale of *Mackay Radio.*

The D.C. Circuit's decision sets forth as a principle of law that economic strikers who desire to return to work prior to the end of a strike must, in effect, abandon their statutory right to reinstatement with seniority intact if they want to avoid being subsequently displaced by more senior strikers. To avoid the risk of such displacement, former strikers would have to quit their jobs and then be hired as "permanent replacements," *i.e.,*

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[10] Contrary to the D.C. Circuit's suggestions, former strikers who were reinstated prior to the end of the strike received no special benefits. None of the former strikers, for example, were granted any super-seniority. To the contrary, all of the former strikers who returned prior to the end of the strike came back under the terms of the old contract. And, once the new collective bargaining agreement was agreed upon, the Company applied the new contract to all employees equally, regardless of whether they returned to work prior to the end of the strike or waited until the end of the strike to make an unconditional offer to return to work. ***The only benefit granted to former strikers by the negotiated PRS was the right not to be subsequently displaced, i.e., the same right that permanent replacements would have.***

as new hires by the employer. It is totally incongruous to hold, as the D.C. Circuit's opinion does, that a union may not insist on the displacement of a person hired as a replacement for a striker, but must insist on the displacement of an employee who returned to work prior to the end of a strike.[11]

The holding of the D.C. Circuit is in clear conflict with the rationale of the Seventh Circuit's very recent holding in *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982). In *Giddings & Lewis*, at the end of the strike, the Giddings & Lewis work force consisted of persons hired as permanent replacements during the strike and twenty-two former strikers who had applied for reinstatement and had been reinstated prior to the end of the strike. *Id.* at 927 n.l. Giddings & Lewis subsequently unilaterally adopted a policy which provided that "permanent replacements *and reinstated strikers* would not lose their positions to more senior unreinstated strikers should a layoff occur." *Id.* (emphasis added).

The Giddings & Lewis layoff policy, thus, protected permanent replacements *and less senior strikers already reinstated to jobs* from job displacement by more senior unreinstated strikers. It is clear, therefore, that at the end of the Giddings & Lewis strike, senior strikers were not permitted to bump less senior strikers from jobs to which they had already been reinstated. By upholding Giddings & Lewis' actions, the Seventh Circuit merely recognized that a striker who returns to work during the course of a strike should at least have the same protection against job displacement as is granted a permanent

[11] Nothing in the settlement stipulation is contrary to the analysis discussed herein. Indeed, the settlement stipulation only required the Company to reinstate strikers to *available* jobs. (C. P. Ex. 3). If the Company was not legally obligated to displace strikers reinstated during the course of the strike, positions filled by strikers who returned to work during the course of the strike would not be "available" jobs.

replacement. The D.C. Circuit's decision in the instant case is in irreconcilable conflict with the *Giddings & Lewis* opinion.

The rationale of the *Giddings & Lewis* decision expressly protects the job rights of both permanent replacements *and* striking employees who apply for reinstatement and are reinstated prior to the strike's end. The *Giddings & Lewis* decision avoids the anomaly of the D.C. Circuit decision in the instant case which inexplicably grants permanent replacements greater job rights than employees who return to work during the course of a strike.

By granting employees who choose to refrain from strike activity inferior job rights to those granted permanent replacements, the D.C. Circuit's decision will affect every employer and every employee involved in a strike. The significance of the decision is apparent when the number of strikes and striking employees is considered. From 1970 to 1979, a representative period, there were an average of 5353 strikes per year in the United States, involving an average of 2,288,400 workers yearly. *See* Monthly Labor Review (U.S. Department of Labor, Bureau of Labor Statistics), Volume 104, Number 12 (December, 1981). The petition should be granted to resolve the important questions of federal law raised by the D.C. Circuit's decision which effectively limits the statutory right of employees to refrain from engaging in strike activity, in direct contravention of federal labor policy.

III. The Decision Of The D.C. Circuit In Finding That The Negotiated Reinstatement System Did Not Constitute A Clear And Unmistakable Waiver Of Statutory Rights Conflicts With Supreme Court And Other Appellate Court Decisions Honoring Such Contractual Waivers And Directly Undercuts National Labor Policy Fostering Freedom Of Contract.

This litigation arose primarily because the Company reinstated striking employees to available jobs at the end of the

strike in accordance with the negotiated Preferential Reinstatement System (PRS), which was signed by the Company and the Union as an integral part of the negotiated collective bargaining agreement. The negotiated PRS explicitly set forth the method by which striking employees would be recalled to work and provided that former strikers who returned to work prior to the end of the strike would not be subject to displacement by other strikers who subsequently applied for reinstatement at the end of the strike (Appendix E). Although the Company reinstated strikers in accordance with the negotiated terms of the PRS, the Union filed unfair labor practice charges alleging that the PRS unlawfully discriminated in favor of employees who had returned to work prior to the end of the strike. In rejecting the Company's position that the Union had waived whatever statutory reinstatement rights the strikers may have had when it signed the PRS as part of the collective bargaining agreement, the District of Columbia Circuit held that a clear and unmistakable waiver of statutory rights did not occur (Appendix A, 18-19). In so ruling, the decision conflicts not only with the import of prior Supreme Court decisions, but with other federal appellate court decisions, including a recent decision by another panel of the D.C. Circuit. Moreover, the D.C. Circuit's decision, in summarily refusing to give effect to a clear and unambiguous contractual provision negotiated in good faith by both the Company and the Union, runs directly counter to the fundamental national labor policy fostering freedom of contract. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

The negotiated PRS is "an express statement in the contract" with respect to the reinstatement rights of the striking employees. *Drake Bakeries, Inc. v. Local 50*, 370 U.S. 254, 265 (1962). Consistent with the Supreme Court's decision in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278-80 (1956), and *Drake Bakeries, supra*, such a contractual provision constitutes a valid waiver of whatever statutory reinstatement

rights the striking employees may have been entitled to at the end of the strike. In sharp contrast with the D.C. Circuit's opinion in the instant case, numerous other federal appellate courts, including the D.C. Circuit, have cited *Mastro Plastics* in finding contractual waivers of statutory rights. *See, e.g., Fournelle v. NLRB*, 670 F.2d 331, 336 (D.C. Cir. 1982) ("The policies compelling the Board and courts to honor such contractual waivers are fundamental ones under the NLRA"); *Southwestern Bell Telephone Co. v. NLRB*, 667 F.2d 470, 476 (5th Cir. 1982); *Pacemaker Yacht Company v. NLRB*, 663 F.2d 455 (3d Cir. 1981); *Prudential Life Insurance Co. v. NLRB*, 661 F.2d 398 (5th Cir. 1981). *See also NLRB v. Lundy Manufacturing Corp.*, 316 F.2d 921, 925 (2d Cir.), *cert. denied*, 375 U.S. 895 (1963) ("... the rights recognized in § 7 may be affected by a valid collective bargaining agreement; to deny this would be to ignore not only the exclusive-representation principle of § 9(a) but the whole policy of Congress, set forth in § 1, of 'encouraging the practice and procedure of collective bargaining' and relying on such agreements for the maintenance of industrial peace...").[12]

The decision of the court below, however, held that the negotiated PRS signed by both the Company and the Union did not constitute a "clear and unmistakable" waiver of the strikers' statutory reinstatement rights (Appendix A, 18-19). The court reached this conclusion solely on the basis of its review of certain correspondence between the Company and the Union prior to the parties signing the collective bargaining agreement which included the PRS. The exchanges established that while the Union reserved the right to challenge the legality

[12] The Board itself has held that the reinstatement rights of striking employees may be waived by clear and unmistakable provisions in a collective bargaining agreement. *See, e.g., United Aircraft Corp.*, 192 N.L.R.B. 382 (1971), *modified*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976); *Western Steel Casting Co.*, 233 N.L.R.B. 870 (1977).

of the negotiated PRS, a right which the Company recognized, the Company specifically advised the Union that it did not construe the Union's acceptance of the PRS as a waiver of reinstatement rights under the NLRA "except to the extent that such rights are waivable and have been waived by the language of the agreement" (Appendix E, 9). By relying entirely on the exchange of correspondence in holding that there was not a "clear and unmistakable" waiver of statutory rights, the court below seriously misinterpreted the Supreme Court's statement in *Drake Bakeries* that statutory rights are waived by "an express statement in the contract." *Drake Bakeries, Inc. v. Local 50, supra,* at 265. It is the explicit language of the collective bargaining agreement, *not* the correspondence relied on by the D.C. Circuit, that creates the waiver.[13] If the parties' correspondence prior to signing the collective bargaining agreement is probative of anything, it highlights the Company's efforts to inform the Union that by signing the contract which included the PRS, the Union waived any rights that the striking employees may have had under the NLRA "to the extent that such rights are waivable and have been waived *by the language of the agreement*" (Appendix E, 9).

[13] The court's misplaced analogy to the "battle of the forms" in a commercial law context (Appendix A, 4-5) illustrates that the court focused on the wrong documents. In commercial law, the "forms" (*e.g.*, forms of offer and acceptance) establish the existence or non-existence of a commercial contract. *See* UCC § 2-207. If the forms indicate that a "meeting of the minds" never occurred, a contract will not exist. Such an analogy is totally inappropriate to the instant situation where the contract (the collective bargaining agreement including the PRS which was an integral part thereof), clearly existed and set forth the reinstatement rights of strikers in clear and unambiguous terms. Where the terms of a commerical contract are embodied in a writing, the "parol evidence" rule precludes reliance on prior agreements or collateral documents to vary or contradict the express terms of the agreement. Given the existence of an unambiguous contract provision setting forth striker reinstatement rights, the court's reliance on "parol evidence" to nullify the contract provision is clearly improper.

In looking to parol evidence rather than the contract itself to decide whether there was a waiver, the decision of the court below directly conflicts with the recent decision of the Fifth Circuit in *Prudential Life Insurance Co. v. NLRB*, 661 F.2d 398 (5th Cir. 1981). In holding that a contractual provision constituted a waiver of an employee's statutory right to have union representation at an investigatory interview, the Fifth Circuit noted that "[a]lthough the Union indicated that Prudential's position was contrary to law, Prudential made it clear that it considered the [contract] clause a waiver of the [statutory] right." *Id.* at 401. Similarly, in the instant case, although the Union likewise disputed the legality of the PRS, the Company made it clear that it considered the PRS to be a waiver of the strikers' reinstatement rights to the extent that such rights were legally waived by the language of the agreement.

The petition should be granted in order to resolve an important question of federal labor law concerning what constitutes a contractual waiver of statutory rights.[14] Moreover, the petition should be granted since the Supreme Court has presently pending a case raising a very similar legal issue, *i.e.*, what constitutes a contractual waiver of a statutory right under the NLRA. *Metropolitan Edison Co. v. NLRB, cert. granted,* ___ U.S. ___, 102 S. Ct. 2926 (1982).

[14] Whether there is a contractual waiver is not affected by the settlement stipulation. In the first place, the existence of such a settlement stipulation does not preclude a union from waiving statutory rights. *Southwestern Bell Telephone Co. v. NLRB*, 667 F.2d 470, 476 (5th Cir. 1982). In any event, the settlement stipulation required the Company to bargain in good faith and to reduce any agreement to writing. In accordance with the settlement stipulation, the Company bargained in good faith with the Union and reduced the resulting labor agreement, including the negotiated PRS, to writing. Thus, the legal question is the same under either the NLRA or the settlement stipulation, *i.e.*, has there been a valid contractual waiver of the strikers' reinstatement rights.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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January 10, 1983

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1816

GEORGE BANTA COMPANY, INC., BANTA DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TRI-CITIES LOCAL 382, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO, INTERVENOR

Petition for Review of an Order of the National Labor Relations Board

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Argued March 12, 1982

Decided August 13, 1982

Judgment entered this date

R. Theodore Clark, Jr., with whom *Joel H. Kaplan* and *James P. Osick* were on the brief, for petitioner. *Fred S. Sommer* also entered an appearance for petitioner.

Collis Suzanne Stocking, Attorney, National Labor Relations Board, with whom *Elliott Moore*, Deputy Associate

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

General Counsel, National Labor Relations Board, was on the brief, for respondent.

Thomas D. Allison, with whom *Eugene Cotton* was on the brief, for intervenor.

Before: MACKINNON and MIKVA, *Circuit Judges*, and COWEN,* *Senior Judge*, United States Court of Claims.

Opinion for the court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: In July 1981, the National Labor Relations Board (NLRB) found that George Banta Co., Inc. (Banta) violated the National Labor Relations Act by granting preferential reinstatement and seniority rights to employees who abandoned a 1977 strike before the strike ended, and by denying the benefits of seniority for purposes of job assignment and computation of rates of pay to other employees who remained on strike as long as the strike lasted. The company petitions for review of the order, and the NLRB cross-applies for enforcement. We find the company's arguments without merit and grant enforcement of the Board's order.

I. BACKGROUND

In 1977, Banta employed some 1,150 printers and other workers at its production facilities in Menasha, Wisconsin. Collective bargaining agreements were set to expire on April 3, 1977, and negotiations for a new contract began in February between Banta and employee representatives (the Union).[1] In mid-March, the Union declared the parties at an impasse and called in a mediator. Bargaining continued until the early morning hours of April 4, the day after the former contracts had expired.

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

[1] In early 1977, Banta's employees were represented by two locals of the Graphic Arts International Union, Local 32-B and Local 88-L. These two locals merged in March 1978 to form Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO.

On April 4, Banta announced that it was immediately implementing its last contract offer, with provisions lengthening the work week and limiting company contributions to a health insurance plan. The Union membership voted on the same day not to work under these unilaterally imposed terms, and began a strike. The Union then accused Banta of commiting unfair labor practices, and in June the NLRB Regional Director filed a complaint against the company charging violations of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the Act), 29 U.S.C. §§ 158(a)(1) and (a)(5). A hearing on these unfair labor practice charges was set for July, 1977.

The hearing was not held, however, because Banta entered settlement negotiations with the NLRB Regional Director. On July 22, 1977, Banta signed a Settlement Stipulation agreeing to revoke the implementation of its last contract offer. The Settlement Stipulation also contained a provision for the reinstatement of strikers to their former or substantially equivalent positions, if jobs were available, upon their making an unconditional offer to return to work. This settlement was expressly contingent on NLRB approval, however, and the strike continued in full force. The Union objected formally to the agreement's terms in August, 1977, and requested a hearing on its arguments. On September 22, 1977, the NLRB General Counsel rejected the Union's arguments, signed the Settlement Stipulation, and forwarded it to the Board for approval.

Banta and the Union resumed their negotiations in the same month, and a number of strikers began returning to work even though the strike had not ended. Banta, anticipating a greatly curtailed workforce as a consequence of the strike, had earlier drawn up a Preferential Reinstatement System (PRS) governing the return of these employees. The company now proposed that the PRS also govern the return of employees at the strike's

end, and presented the PRS to the Union on October 4, 1977.

The course of negotiations over the next week will sound familiar to students of the so-called "battle-of-the-forms" in the context of commercial law. The Union objected strenuously to the PRS, arguing that employees should be reinstated after the strike based on their unit seniority. On October 6, Banta responded with a contract proposal that again included the PRS, which it called an "absolute last and final" offer. When the Union repeated that the contract was unacceptable, Banta officials left the meeting. On October 8, however, the Union members voted to accept Banta's proposal, and authorized the Union to make an unconditional offer to return to work. The members also voted to inform Banta that the PRS was not in accordance with their legal rights under the Act. The Union signed the Settlement Stipulation and made the unconditional offer to return to work on the same day, adding:

> We do not agree with the Company's interpretation of the statutory rights of returning employees, as set forth in the PRS. We will rely on the statutory rights of reinstatement as provided by the NLRA and the Settlement Stipulation described above, and, of course, we do not waive any of those rights.

Banta accepted the unconditional offer to return to work, but noted that the PRS

> was and is an integral part of our October 6, 1977, offer. Since you have not accepted our total offer, there is no contract between the employer and [the Union]. Construing your letter as a counter proposal, we reject it for reasons previously advanced.

Two days later, the Union reaffirmed its intention to accept the "total offer, including your PRS, to the full extent that the PRS does not violate the legal reinstatement rights of the striking employees." The Union added:

> If it is the entent [sic] of your letter of October 8, 1977 to assert that it was a condition of your offer that there be a waiver of the right to present to the NLRB any question as to the legal reinstatement rights of the strikers which may not be essectuated [sic] by your proposed PRS, please advise us so that we may give further consideration to our position.

Banta now responded:

> It is our understanding that while you have accepted our total offer, you have reserved the right to challenge the legality of all or portions of the PRS. This is, of course, your right and we do not construe your acceptance of our total offer as a waiver of any rights under the [Act] except to the extent such rights are waivable and have been waived by the language of the Agreement.

With these conciliatory words masking the obviously serious disagreement remaining between the parties, the strike came to an end.[2]

On October 20, 1977, the Union filed a second set of unfair labor practice charges against Banta alleging that the PRS violated sections 8(a)(1) and 8(a)(3) of the Act. The Union also alleged that the PRS violated the terms of the Settlement Stipulation, *which had still not been approved by the NLRB.* The Board's delay now caused a bifurcation of the legal proceedings. One fork involved Banta's attempt to withdraw from the Settlement Stipulation; the second led to the Board order that is under review in this case.

A. *Banta's Efforts to Withdraw from the Settlement*

Five days after the Union filed the second set of unfair labor charges, Banta notified the NLRB that

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[2] The statements quoted above were made in a series of letters exchanged by Banta and the Union between October 8 and October 10, 1977. *See* Joint Appendix (J.A.) 143, 145, 146, 147.

> in light of the great delay in approving Settlement . . . and due to new issues relative to the Settlement raised [by the Union], effective immediately the Employer withdraws its offer of Settlement.

The NLRB conducted hearings and ultimately refused to allow Banta to withdraw from the Settlement Stipulation. It entered an order enforcing the terms of this settlement on July 14, 1978, and Banta appealed to the Fourth Circuit. In August 1979, the Fourth Circuit issued its decision in *George Banta Co. v. NLRB*, 604 F.2d 830 (4th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), hereinafter cited as *Banta I*. The Fourth Circuit enforced the NLRB's order, holding that Banta could not unilaterally withdraw from the Settlement Stipulation prior to the Board's approval.[3] *Banta I* recognized that the ongoing litigation of the Union's most recent charges (*Banta II*) might be mooted by the Settlement, but added:

> The record before us does not establish whether *Banta II* represents a full litigation of the issues purportedly resolved in the settlement stipulation, and we express no opinion on the propriety of the Board's actions in that litigation. The *Banta II* proceeding, which seeks a remedy only for post-strike violations of the Act, is not a substitute for the settlement agreement designed to remedy pre-strike violations. We believe that any objections Banta may have to the scope of the *Banta II* litigation should be raised in that litigation.

604 F.2d at 838.

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[3] Judge Bryan dissented on the ground that the General Counsel's "utter laxity" in completing execution of the Settlement abrogated the Settlement Stipulation and justified Banta's termination of the agreement. 604 F.2d at 838-39. The dissent characterized the General Counsel's inaction as inexplicable and deplorable, and suggested that Banta felt "understandable exasperation" at the General Counsel's "inordinate dallying" and "dawdling." *Id.* at 839.

B. *Banta's Efforts to Justify the PRS under the Act*

In April 1978, several months before the NLRB rejected Banta's efforts to withdraw from the Settlement Stipulation, the Regional Director issued a Complaint against Banta based primarily on the Union's second set of unfair labor practice charges.[4] The Complaint charged that Banta's method of reinstating returning strikers constituted an unfair labor practice under sections 8(a)(1) and 8(a)(3) of the Act. No reference was made to the Settlement, whose validity Banta was still challenging.

Hearings on the Complaint began before an administrative law judge (ALJ) on August 21, 1978. By this time, the NLRB had approved the Settlement but the status of the Settlement now depended on the outcome of Banta's appeal to the Fourth Circuit in *Banta I*. The inability to rely on the Settlement presented difficulties to counsel for the NLRB General Counsel (NLRB counsel); he therefore proceeded on the assumption that Banta's PRS was unlawful under the Act only if the strike had concerned unfair labor practices.[5] As NLRB counsel stated during the hearing: "We are not attacking the validity of the PRS if it's found to have been an economic strike."

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[4] Consolidated with this Complaint were charges that Banta had violated Section 8(a)(1) of the Act by discharging seven employees for strike-related misconduct. The Board affirmed the ALJ's finding that Banta had committed violations with regard to three of these employees, and Banta does not challenge that finding here. Brief for Petitioner Banta (Banta Brief) at 15 n.11. We therefore grant enforcement of the portions of the Board's order concerning these discharges without further review.

[5] An "unfair labor practice strike" is a strike caused by an employer's commission of unfair labor practices; an "economic strike" is a strike over wages, hours, or terms and conditions of employment. Both economic and unfair labor practice strikers retain their status as "employees" under Section 2(3) of the Act, 29 U.S.C. § 152(3), but their reinstatement rights may vary. *See* pp. 19-21 *infra*.

Hearing Transcript, Joint Appendix (J.A.) 657. To NLRB counsel, the Settlement proved that the earlier strike had concerned labor practices rather than economic issues. In light of Banta's continuing attacks on the Settlement's validity, however, NLRB counsel announced early in the hearing that he planned to introduce evidence demonstrating that Banta had acted unilaterally on April 4, 1977, thus showing that the strikers were protesting unfair labor practices.

Banta opposed the introduction of this evidence. The ALJ issued a preliminary ruling that because the strikers' reinstatement rights would be considered in the context of the Settlement, it was unnecessary to litigate whether the strike had been economic or not. Both parties filed interim appeals with the NLRB. Banta challenged the ruling that reinstatement rights would be determined by the Settlement, which was still under legal attack, and the General Counsel challenged the ALJ's refusal to allow background testimony about the events of April 4, 1977, in light of the possibility that the Settlement might be overturned by the Fourth Circuit. In September 1978, the NLRB affirmed the ALJ's ruling that the Settlement was dispositive of the unfair labor practice issue for purposes of considering the strikers' reinstatement rights. The NLRB reversed the ALJ on the second issue, however, and allowed the introduction of background testimony concerning the initiation of the strike on April 4, 1977. The hearing then resumed before the ALJ.

In October 1978, the ALJ issued a 76-page decision finding Banta's PRS "inherently discriminatory and unlawful" under the Act, regardless of the validity of the Settlement or whether the strike concerned economic as opposed to unfair labor practice issues. In an alternative holding, the ALJ ruled that even if the legality of the PRS depended on whether the strike had been economic or caused by unfair labor practices, the Settlement gave Banta's employees reinstatement rights as unfair labor

practice strikers. Finally, the ALJ found that a bargaining impasse *had* existed on April 4, 1977, and that contrary to the weight of the Settlement Stipulation the strike had therefore been economic rather than based on unfair labor practices. This latter finding wrapped up the issues raised during the hearing by the NLRB's introduction of background testimony concerning the events of April 4, 1977, but was totally irrelevant to the ALJ's conclusion that the PRS was unlawful under both the Settlement and the Act.

Banta appealed to the NLRB, but before the appeal was heard the Fourth Circuit issued *Banta I*. The decision considerably eased the Board's review because it preserved the ALJ's alternative basis for finding the PRS unlawful. On July 16, 1981, the NLRB adopted the ALJ's order, and affirmed the ALJ's "rulings, findings, and conclusions" with one exception. In a footnote to this phrase, the Board stated:

> Inasmuch as we find the reinstatement rights of the strikers herein to have been determined by our Decision and Order in [*Banta I*], we find it unnecessary to reach or pass upon the issue of whether Respondent and the Charging Party had reached a bargaining impasse or whether the ensuing strike was an economic or an unfair labor practice strike.

256 NLRB ——, —— n.4 (1981), J.A. 82, 83 n.4. It is from this order of the Board that Banta appeals.

II. Discussion

From start to finish, the chief difficulty in this case has been the multitude of alternative grounds for finding Banta's liability. Early in the NLRB proceedings, when the Settlement's validity was still in doubt, NLRB counsel operated on the assumption that Banta should be found liable under the Act because the April 4, 1977, strike concerned unfair labor practices. By the time the ALJ rendered his initial decision, the Board had rejected

Banta's attempts to withdraw from the Settlement and the ALJ was thus free to use the Settlement as an alternative ground for his holding. In addition, the ALJ went beyond the contentions of NLRB counsel and held that Banta's PRS was unlawful under the Act even if the April 4, 1977, strike was economic. By the time the Board decided the appeal from the ALJ's decision, the Fourth Circuit had issued its decision in *Banta I*, thus leading the Board to state that "we find the reinstatement rights of the strikers herein to have been determined by" that case. 256 NLRB at —— n.4, J.A. 83 n.4.

The proliferation of grounds for finding Banta's PRS unlawful has made a tangle of what would otherwise be a straightforward case. Banta interprets the Board's footnote 4 as limiting the Board's affirmance of the ALJ to the basis of the Settlement found binding in *Banta I*. Banta then contends that this is an improper basis for the Board's decision, giving two grounds. First, Banta argues that the NLRB is without jurisdiction to enforce compliance with an order of the Fourth Circuit. Second, Banta claims that its due process rights have been violated because its liability under the Settlement was neither alleged in the Complaint nor fairly and fully litigated before the ALJ. After thus dealing with the Board's order, Banta goes on to challenge the ALJ's finding that it was also liable under the Act. In this context, Banta argues that because the strikers were economic, the PRS did not abridge their statutory reinstatement rights. Even if this were not the case, Banta continues, the negotiated PRS constituted a clear waiver of whatever statutory rights the strikers may have had. Finally, even if these rights were not waived by contract, Banta urges that it violates due process to find Banta liable under the Act because the NLRB counsel neither alleged nor litigated the issue of whether the PRS was statutorily invalid given the economic nature of the strike.

In fairness to the parties, and not because all of the discussion is essential to our holding, we set out Banta's arguments and our reasons for rejecting them below.

A. *The NLRB's Reliance on the Settlement*

Section 10(e) of the Act provides that when a federal court is petitioned to review an order of the NLRB, exclusive jurisdiction over the case vests in the court:

> Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final . . . .

29 U.S.C. § 160(e). Absent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court. *See, e.g., Service Employees Int'l Union Local 250 v. NLRB*, 640 F.2d 1042, 1043-46 (9th Cir. 1981). If approved or enforced by a reviewing court, a Board order necessarily becomes an order of the court, and the court rather than the Board has jurisdiction to enforce compliance. If the Board believes that a party has failed to comply with a court order, the Board may institute contempt proceedings in the appropriate court. *See Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 270 (1940).

Banta contends that because the Settlement was approved and enforced in *Banta I*, that order is enforceable only through a contempt proceeding in the Fourth Circuit. This claim utterly mischaracterizes the Board's action in the proceeding before us and glosses over material differences between this case and *Banta I*. As the Fourth Circuit noted in *Banta I*,

> [t]he *Banta II* proceeding, which seeks a remedy only for post-strike violations of the Act, is not a substitute for the settlement agreement designed to remedy pre-strike violations.

604 F.2d at 838. The central issue in *Banta I* was whether the company could withdraw from a Settlement Stipulation because of the Board's delay in approving that settlement. *Banta I* is thus entirely collateral to the litigation here, because nothing in that decision concerns the compatibility of the PRS with the reinstatement rights guaranteed by Banta in the settlement. Banta did not even draw up the PRS until after it had executed the Settlement Stipulation. There is a clear distinction between adjudicating whether a contract exists, and determining whether an act complies with the contract's terms.[6] The NLRB obviously had jurisdiction to hear the Union's challenges to the PRS under the Act, and at its worst footnote 4 simply states that an intervening judicial decision made it unnecessary for the NLRB to reach certain questions.[7] We cannot view the Board's actions here as an impermissible attempt to enforce compliance with the Fourth Circuit's order in *Banta I*.

We take far more seriously Banta's contention that the Board's order bases liability on an allegation neither made in the Complaint nor litigated at the hearing. It is axiomatic that "[t]he Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hear-

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[6] Although these claims are usually raised in the same proceeding for reasons of economy, this is not always the case. *See, e.g., Mosher Steel Co.*, 226 NLRB 1163 (1976), *enforced sub nom. Mosher Steel Co. v. NLRB*, 568 F.2d 436 (5th Cir. 1978), which concerned an unlawful failure to reinstate strikers earlier found to have the reinstatement rights of unfair labor practice strikers in *Mosher Steel Co.*, 220 NLRB 336 (1975), *enforced mem. sub nom. Mosher Steel Co. v. NLRB*, 532 F.2d 1374 (5th Cir. 1976).

[7] *Banta I* may thus be analogized to any other intervening judicial decision that collaterally resolves an issue of law in a case pending before the NLRB. It is clever to characterize the Board's action here as an effort to enforce compliance with *Banta I*, but it is more accurate to say that *Banta I* took certain aspects of this proceeding out of the Board's hands.

ing." *NLRB v. Blake Construction Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981); *see Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981); *Amalgamated Meat Cutters Local 567 v. NLRB*, 663 F.2d 223 (D.C. Cir. 1980). "Even where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself." *NLRB v. Blake Construction Co.*, 663 F.2d at 279. We must agree with Banta that the Complaint did not allege Banta's violation of any term of the Settlement, and that a serious issue of due process would exist had the Board based its order solely on an unrelated agreement that played no part in the proceedings before the ALJ.

Banta's contention has no merit, however, for two reasons. First, from the outset of the hearings when the ALJ issued his preliminary ruling that it was irrelevant whether the April 4, 1977, strike had been economic or not, Banta was on express notice that its employee's post-strike reinstatement rights would be determined by the settlement agreement. The ALJ explained:

> The Board's Decision and Order (236 NLRB No. 224) imposes an obligation upon Respondent Employer with respect to its alleged bad faith bargaining and the reinstatement rights of the strikers. Respondent Employer must of course comply with this outstanding obligation and, consequently, the current Section 8(a)(3) allegations pending before me will be assessed in the context of Employer's continuing duty to comply with the Board's Decision and Order. . . . The earlier Decision and Order imposed an obligation upon the Employer which is a continuing obligation.

ALJ Ruling and Order, August 30, 1978, at 3-4, J.A. 782-83. Both Banta and the Union filed interim appeals from this preliminary order, and Banta's appeal concerned this ruling in particular. Its attempt was unsuc-

cessful. By no means may Banta now suggest credibly that its liability under the Settlement came as a surprise, or that this issue was not fully and fairly litigated.

The ALJ based his preliminary ruling on *Poole Foundry & Machine Co. v. NLRB*, 192 F.2d 740 (4th Cir. 1951), *cert. denied*, 342 U.S. 954 (1952), which held that settlement agreements establish rights and liabilities that not only can, but must be recognized in subsequent Board proceedings.

> While not an admission of past liability, a settlement does constitute a basis for future liability and the parties recognize a status thereby fixed.

Id. at 743. At the time the NLRB counsel began to proceed against Banta, the company was aggressively attempting to withdraw from the Settlement Stipulation and it is not surprising that NLRB counsel did not rely on the settlement agreement. It should be noted, however, that the reinstatement rights guaranteed by that agreement differ in no respect from the statutory reinstatement rights of employees who participate in unfair labor practice strikes.[8] When NLRB counsel attempted to show that the April 4, 1977, strike concerned unfair labor practices, he sought nothing more or less than reestablishment under the Act of the reinstatement procedures set forth in the Settlement. In this sense, the Board's footnote reference to the Settlement simply may not be given the narrow reading that Banta urges. Banta's due process complaint is unavailing because the Complaint's allegations under the Act and the terms fixed in the Settlement go

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[8] The Complaint filed by the NLRB against Banta in June 1977 alleged that the strike concerned unfair labor practices, and the Settlement Stipulation phrased the terms of reinstatement accordingly. As the Fourth Circuit noted in *Banta I*, "the agreement includes a statement of the striking employees' reinstatement rights, which coincide precisely with those of unfair labor practice strikers." 604 F.2d at 832.

to the identical "underlying issue." *NLRB v. Blake Construction Co.*, 663 F.2d at 279. Whether Banta's PRS was tested against the standard set by the Act or the terms of the Settlement, the issues were the same.

B. *The Requirements of the Act*

Section 7 of the Act guarantees employees

> the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157. Section 8(a)(1) provides that it "shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157," 29 U.S.C. § 158(a)(1), and section 8(a)(3) prohibits employer discrimination against employees engaging in union activities protected by section 7. 29 U.S.C. § 158(a)(3).

There is unquestionably substantial evidence on the record to support the NLRB's finding that Banta violated sections 8(a)(1) and 8(a)(3) by granting preferential reinstatement and seniority rights to returning employees who abandoned the strike before the strike ended. Under Banta's PRS, the company retained in active employment all "cross-overs"—employees who had abandoned the strike early and crossed over the picket line. Banta assigned each "cross-over" the job classification and wage rate held by the employee before the strike regardless of the company's production requirements or the work actually performed by the employee during the strike. Those full-term strikers who were called back were assigned the remaining work at whatever classification status Banta deemed appropriate, and thus a difference of a few hours caused by whether an employee of-

fered to return to work before or after the strike's end had significant repercussions to the employee's wage rate and other benefits.[9] Banta does not dispute the discriminatory effect of the PRS, and it is not necessary to discuss the preferential reinstatement system in great detail.

Instead, Banta claims that the PRS gave "cross-overs" no *prospective* benefits of the sort condemned in *Erie Resistor Corp.*, 132 NLRB 621 (1961), *aff'd sub nom. NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (inherently discriminatory to grant twenty years superseniority for layoff purposes to strike replacements and employees abandoning a strike), and that the PRS was justified by Banta's legitimate business needs. The sec-

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[9] For example, pressman Don Williams had been employed by Banta for more than 23 years and was earning $10.29 per hour immediately before the strike. On Friday, October 7, 1977, Williams telephoned a Banta official and stated that he was willing to return to work the following Monday "with or without" the Union, although he hoped the Union membership would vote to accept Banta's contract proposal the next day. Williams said that if the membership rejected the contract he would resign from the Union and return to work. On Sunday, October 9, a Banta representative telephoned Williams and asked whether he "wanted to be on the preferential reinstatement list." Williams replied that he would "go back with the Union." When Williams reported to work, he was reclassified to a lower position earning $7.58 per hour, even though his co-workers who had abandoned the Union had been assigned to their pre-strike classifications and pay rates. *See* J.A. 55-56, 609-64. In general, Banta employed the PRS to insulate cross-overs from the consequences of a smaller company workforce, thus returning them to their pre-strike classifications and reinstating Union members to whatever positions were left. This built-in favoritism was further advanced by Banta's efforts to accommodate cross-overs regardless of production requirements. As one plant superintendent testified at the hearing, "the fact that there were 16 strippers on November 7 doesn't reflect any decision by Management that [it] needed 16 strippers; it simply reflects that 16 strippers who were journeymen strippers crossed the line." J.A. 56.

ond argument was correctly rejected by the ALJ,[10] and the first is completely spurious. It defies reason to claim that while *Erie Resistor* bars employers from unlawfully favoring cross-overs with seniority benefits, the case is silent about rates of compensation. Whether the benefit is "current" or "prospective," the relevant question is whether the employer has illegally burdened the statutory right to strike by artificially dividing the workforce into those who did not engage in strike activity and those who did. "Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained . . . ." *NLRB v. Erie Resistor Corp.*, 373 U.S. at 231. Such divisions, which stand "as an ever-present reminder of the dangers connected with striking and with union activities in general," *id.*, may not be countenanced under the Act because the claimed business purpose does not outweigh the necessary harm to employee rights. *See id.* at 237. In such cases, the nature of the particular benefit is irrelevant.[11]

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[10] A Banta official admitted at the hearing that there would have been no difference in terms of cost, efficiency, training, or subsequent shuffling of personnel had the company staffed all positions at the end of the strike according to the seniority of qualified employees. J.A. 720-24. The ALJ found that "Management's asserted business reasons for its reinstatement plan do not withstand close scrutiny" because "Management could have achieved essentially these same business objectives without drawing a line of demarcation between 'cross-overs' and returning strikers." Initial Decision, J.A. 65.

[11] *See, e.g., Rogers Manufacturing Co. v. NLRB*, 486 F.2d 644, 646-48 (6th Cir. 1973), *cert. denied*, 416 U.S. 937 (1974) (destructive of right to strike for employer to deny employees seeking reinstatement full credit for their previously accrued seniority); *Great Lakes Carbon Corp. v. NLRB*, 360 F.2d 19, 20-21 (4th Cir. 1966) (destructive of right to strike for employer to grant employees who abandon a strike preference with respect to protection from layoff, preferred shifts, and other employment rights); *Swarco, Inc. v. NLRB*, 303 F.2d 668, 670-73 (6th Cir. 1962), *cert. denied*, 373 U.S. 931 (1963)

Banta anticipated this conclusion by presenting two defenses to the finding that it was liable under the Act. We discuss these arguments in turn.

1. *Contractual waiver of statutory rights*

Banta first contends that the PRS was "negotiated and accepted by the Union," Brief for Petitioner Banta (Banta Brief) at 45, and thus constitutes a waiver of whatever statutory reinstatement rights the strikers may have had. Banta's ultimate position in the negotiations preceding the conclusion of the strike, *see* p. 5 *supra*, was that it did not construe the Union's acceptance of the company's "total offer" as a waiver of any statutory rights "except to the extent such rights are waivable and have been waived by the language of the Agreement." Banta now restates this position with a slightly different emphasis, and contends that it

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(destructive of right to strike for employer to promise pre-strike employees who abandon a strike immunity from "bumping" by later returning strikers with greater seniority). Banta posits the legality of its PRS on the Board decisions in *Bio-Science Laboratories*, 209 NLRB 796 (1974), and *Brown and Root, Inc.*, 132 NLRB 486 (1961). These cases are inapposite. The question presented in *Bio-Science* was simply whether the employer had violated the Act by rejecting the union's insistence that economic strikers be recalled and permanent replacements laid off. The Board did not address the propriety of giving reinstatement priority to employees who abandoned the strike. Although *Brown and Root* states that the Board does not require the "displacement" of "old employees" in order to make room for returning unfair labor practice strikers, 132 NLRB at 514 (Initial Decision), nothing in the opinion suggests that the term "old employees" includes former strikers who have already abandoned a strike. We need not decide here whether employers in *all* cases are barred from offering employees *any* kind of benefits in order to continue operation during an economic strike. *See Erie Resistor*, 373 U.S. at 237 (Harlan, J., concurring).

> specifically advised the Union that any rights under the NLRA *were* waived "to the extent such rights are waivable and have been waived by the language of the agreement."

Banta Brief at 45 (emphasis added).

We find this contention patently unconvincing. Banta's shift in emphasis alone indicates the weakness of the company's argument, which first depends on showing that the Union's waiver was "clear and unmistakable." *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 457 (3d Cir. 1981); *see Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). Even if employee waiver of reinstatement rights were permissible under the Act—an issue we do not reach—the waiver of statutory rights must be demonstrated by "an express statement in the contract to that effect," *Drake Bakeries, Inc. v. Local 50, Bakery & Confectionery Workers*, 370 U.S. 254, 265 (1962). Even explicit language "will not be read expansively." *Delaware Coca-Cola Bottling Co. v. General Teamster Local 326*, 624 F.2d 1182, 1188 (3d Cir. 1980). The exchanges between Banta and the Union that led to the settlement of the strike in October 1977 permit but one objective interpretation: the parties had agreed to disagree about the legality of the PRS, and the issue would be resolved in a subsequent challenge by the Union. If Banta entertained a different subjective view of the negotiations, the burden was on the company to correct what was so obviously the Union's understanding of the situation. The agreement provides absolutely no support for the suggestion that a clear and unmistakable waiver of statutory rights took place here.

2. *Due process violations by the NLRB*

Banta's second and final defense against liability under the Act is that the Board's order violates due process because the NLRB counsel explicitly and frequently asserted that the legality of the PRS depended on whether the

strike concerned unfair labor practices. For example, the NLRB counsel stated:

> If this were an economic strike . . . we would not be alleging the preferential reinstatement system violated Section 8(a)(3). . . . We are not attacking the validity of the preferential reinstatement system if it's found to have been an economic strike.

Hearing Transcript, J.A. 657.[12] As a result, Banta argues that the validity of the PRS in the context of an economic strike was neither alleged in the Complaint nor fairly and fully litigated. Although this is by far Banta's strongest argument, it too must be rejected.

The statutory reinstatement rights of economic and unfair labor practice strikers are identical, with one significant exception. During an economic strike—but not during an unfair labor practice strike—an employer may hire permanent replacements for the striking employees. *See, e.g., NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). At the end of an economic strike, the employer is not required to discharge or lay off these permanent replacements in order to create vacancies for the employees seeking reinstatement. In contrast, an employer may not hire permanent replacements during the course of a strike over unfair labor practices; his employees "are entitled to immediate and nondiscriminatory reinstatement upon their unconditional offer to return to work, even if such reinstatement requires dismissal of replacements who have been hired to fill their jobs during the strike." *Banta I*, 604 F.2d at 832 n.1.

The distinction between the two kinds of strike is irrelevant, however, if the employer has not hired perma-

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[12] The ALJ frequently prodded NLRB counsel on this point, perhaps because the NLRB's position was at such odds with the theory of the Charging Party (the Union) and the understanding of the ALJ as reflected by his preliminary rulings. *See, e.g.*, J.A. 452-54, 456, 521-22, 586, 657, 773.

nent replacements. In such a situation, both economic and unfair labor practice strikers have identical entitlements to reinstatement without discrimination on the basis of relative union activity.[13] The ALJ found, and Banta concedes, that the company hired no permanent replacements during the course of the strike. Initial Decision at 41, 60, J.A. 44, 63. *See* Banta Brief at 8 n.7. The question before the ALJ concerned Banta's reinstatement obligations toward employees who returned during as opposed to after the strike. Under these circumstances, given the absence of permanent replacements, the company's statutory duties were identical whether its employees were economic strikers or unfair labor practice strikers—and thus there was no reason for the Board to review the ALJ's finding that the strike was economic.

It is therefore evident that the violation found in this proceeding was the violation alleged in the Complaint. The Complaint alleged that Banta had violated sections 8(a)(1) and (a)(3) of the Act by engaging in the following conduct:

> On or about October 10, 1977, and thereafter, [Banta] granted, and continues to grant, preferential reinstatement rights or preferential seniority rights to jobs and rates of pay to those employees

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[13] Because even economic strikers retain their status as "employees," *see* note 5 *supra*, an employer may not refuse to reinstate these strikers other than for "legitimate and substantial business justifications" without unlawfully discouraging employees from exercising their rights to organize and strike. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)). "An employer may refuse to reinstate 'economic strikers' if the positions they left during the strike have been filled [by permanent replacements], although he may not discriminate on the basis of relative union activity when filling vacancies which remain when the strike is over." *Banta I*, 604 F.2d at 832 n.1.

> who had abandoned the above-described strike and who offered to or did return to work at [Banta] before the [Union] abandoned the strike against [Banta].
>
> On or about October 10, 1977, and thereafter, [Banta] denied seniority and the benefits of seniority for purposes of job assignment and rates of pay to those employees who had engaged in the strike against [Banta] until abandoned by [the Union].

Complaint, ¶ 16(a), (b), J.A. 88-89. Nothing in the Complaint suggested that the legality of this conduct depended on whether the strike concerned unfair labor practices. Banta has not suggested any claims or evidence that it would have presented to the ALJ but for NLRB counsel's emphasis on unfair labor practices,[14] and the ALJ found that Banta was not prejudiced in any way by NLRB counsel's statements at the hearing. Initial Decision at 63, J.A. 66. This is not a situation in which violations of the Act were found that had not been alleged in the Complaint, and the cases on which Banta relies are entirely distinguishable on this basis alone.[15]

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[14] Banta does suggest, and we agree, that NLRB counsel's statements probably led it to present *more* evidence than was required. *See* Banta Reply Brief at 9 n.12 ("the vast majority of testimony elicited at the hearing concerned whether a bargaining impasse existed on April 4, 1977"). Although such a waste of time and resources is highly regrettable, it hardly constitutes a violation of due process.

[15] In these cases the courts have found substantial variance between the allegations and the issues contemplated in the proceeding and the violation ultimately found, particularly those involving an entirely different section of the Act. *See, e.g., NLRB v. Blake Construction Co.*, 663 F.2d at 277-78 (complaint did not allege company's failure to extend benefits of contract to nonunion employees or company's refusal to deal with union as representative of those employees); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d at 1079, 1083, 1101 (complaint did not allege violations of section 8(a)(5) with respect to wage increases, reneging on commitments made in ongoing negotiations, or bad faith during overall conduct

Moreover, despite the comments of NLRB counsel, the ALJ's preliminary rulings must have given Banta notice that the ALJ considered the nature of the strike irrelevant to the charges against the PRS. Although subsequently reversed by the Board, the ALJ initially ruled that he would exclude background testimony about the events of April 4, 1977. It may be true that an ALJ should not "undertake to decide an issue which he alone has injected into the hearing," *NLRB v. Tamper, Inc.*, 522 F.2d 781, 790 (4th Cir. 1975), but he may "decide an uncharged violation which has been fully litigated by the parties." *Id.* In this case, the Union had also argued from the beginning of the proceeding that Banta's PRS was unlawful regardless of the legal status of the strikers.[16] All pertinent issues and allegations were exhaustively litigated at the hearing—the method and times of employee reinstatement under the PRS, the consequences for seniority and wage rates, and Banta's purported defenses of waiver and business justification. Banta thus had "a meaningul opportunity to litigate the underlying issue in the hearing," *NLRB v. Blake Construction Co.*, 663 F.2d at 279, and the company took full advantage of this opportunity.

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of negotiations); *NLRB v. Tamper, Inc.*, 522 F.2d at 788 (complaint did not allege that company discipline of employee was motivated by employee's union activities; the company thus "did not undertake to present evidence justifying its actions," and "the parties were not advised by the Administrative Law Judge that he would try this as a separate offense").

[16] *See, e.g.*, Union's First Amended Charge, J.A. 344-45; Hearing Transcript, J.A. 522, 803-04 ("there are many aspects of the PRS that are illegal and discriminatory regardless of the nature of the strike"). A charging party has the statutory right to "propound theories which the general counsel fails or refuses to rely upon," *International Union of Electrical Workers v. NLRB*, 289 F.2d 757, 760 (D.C. Cir. 1960), and the ALJ and the Board are permitted to accept or reject these theories in their adjudicatory function. *See* note 17 *infra*.

Finally, although we have some sympathy for Banta's frustration at the misleading comments of NLRB counsel, we agree with the Board that counsel's comments in their entirety hardly demonstrate a coherent theory of the case on which Banta could have relied comfortably. For example, NLRB counsel initially assumed that the PRS in the context of an economic strike was unassailable because the Union had "signed" it. Hearing Transcript, J.A. 452-54. Even so, NLRB counsel refused to suggest that the Union had waived its statutory rights. *Id.*, J.A. 657. By the time NLRB counsel submitted his post-hearing brief to the ALJ, he argued that the Union had refused to waive its rights and that any attempted waiver would have been invalid because the PRS was "inherently discriminatory" under *Erie Resistor* and other cases involving economic strikes. *See* Brief for Respondent NLRB (NLRB Brief) at 46 n.18. Ultimately, of course, these shifts in position are irrelevant because the legal theories and policy conceptions of NLRB counsel are not binding on the Board:

> Congress intended that the Board should retain its judicial and policy making functions. . . . [O]nce the decision has been made to issue a complaint and to prosecute it, the General Counsel has embarked upon the judicial process which is reserved to the Board. If the General Counsel can control this process, then the General Counsel can indeed usurp the Board's responsibility for establishing policy under the Act . . . .

Frito Co. v. NLRB, 330 F.2d 458, 463-64 (9th Cir. 1964). As the NLRB now observes, "to hold that the Board is bound by counsel for the General Counsel's understanding or, in this case, misunderstanding of applicable law . . . would be to assign to the General Counsel matters that

clearly fall within the adjudicatory function of the Board." NLRB Brief at 47. We agree.[17]

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[17] Banta places particular stress on the line of cases holding that the General Counsel has sole statutory authority to issue unfair labor practice complaints and determine the scope of those complaints under Section 3(d) of the Act, 29 U.S.C. § 153(d). *See, e.g., Winn-Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343, 1350 (5th Cir.), *cert. denied*, 439 U.S. 985 (1978) (statute "leaves to the general counsel the decision as to what is and what is not at issue in an unfair labor practice hearing"); *Wellington Mill Division, West Point Mfg. Co. v. NLRB*, 330 F.2d 579, 590 (4th Cir.), *cert. denied*, 379 U.S. 882 (1964) ("The decision as to the scope of a complaint is for the General Counsel"); *Frito Co. v. NLRB*, 330 F.2d 458, 464 (9th Cir. 1964) (General Counsel is "vested with final authority in respect to prosecution of the complaints he issues"). It is true that the Board cannot entertain an amendment to the complaint which the General Counsel opposes. *See United Steelworkers of America v. NLRB*, 393 F.2d 661, 664 (D.C. Cir. 1968). We consider these cases beside the point, however, because Banta's argument ignores the adjudicatory responsibilities of the Board.

Just as the Act contemplates that administrative law judges will serve as neutral, impartial finders of fact who may not undertake "the General Counsel's prosecutorial function by ferreting out evidence of uncharged violations," *NLRB v. Tamper, Inc.*, 522 F.2d at 790, so the Act places judicial and policymaking functions with the Board, including the responsibility to determine which issues *are* within the scope of a complaint. Thus, the Board "has an obligation to decide material issues which have been fairly tried by the parties even though they have not been specifically pleaded." *American Boiler Manufacturers Ass'n v. NLRB*, 404 F.2d 547, 556 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970); *see Soule Glass & Glazing Co. v. NLRB*, 652 F.2d at 1074; *Drug Package, Inc. v. NLRB*, 570 F.2d 1340, 1345 (8th Cir. 1978); *REA Trucking Co. v. NLRB*, 439 F.2d 1065, 1066 (9th Cir. 1971). "[I]t should be observed that defining the issues which are posed by the opposing pleadings has always been regarded as a judicial function. . . . The proof having been admitted without objection [from the General Counsel], what is to be done with it is no longer a part of the prosecution of the cause." *Frito Co. v. NLRB*, 330 F.2d at 464-65. The

Where there is a substantial difference between the Board's theory of the case and the approach of NLRB counsel, such that a party may have relied to its detriment on counsel's statements and thus failed to adduce facts or make arguments relevant to the Board's disposition, our review of alleged due process violations must be searching. "It offends elemental concepts of procedural due process to grant enforcement to a finding neither charged in the complaint nor litigated at the hearing." *Montgomery Ward & Co. v. NLRB*, 385 F.2d 760, 763 (8th Cir. 1967). In this case, however, Banta's contention lacks the necessary critical mass. A similar argument was made and rejected in *Rogers Manufacturing Co. v. NLRB*, 486 F.2d 644 (6th Cir. 1973), *cert. denied*, 416 U.S. 937 (1974), which also involved a preferential reinstatement system. In *Rogers*, as here, NLRB counsel also proceeded on a theory that the employer's post-strike conduct was illegal only if the strikers had the reinstatement rights of unfair labor practice strikers, but the ALJ and the Board found violations of sections 8(a)(1) and 8(a)(3) regardless of the nature of the strike. The Sixth Circuit summarily rejected the employer's due process claim:

> The Company also argues that the complaint herein did not allege discrimination against the strikers as

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Board's analysis may be tested against principles of procedural due process, of course, but "the test is one of fairness under the circumstances of each case—whether the employer knew what conduct was in issue and had a fair opportunity to present his defense." *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d at 1074. Banta's due process argument is not buttressed in the least by the claim that the Board has somehow encroached on the prosecutorial functions of the General Counsel in this case. "While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory." *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938).

> economic strikers but only as unfair labor practice strikers. We are satisfied that any variance was not prejudicial.

486 F.2d at 648. It is distressing that this sorry situation has arisen before, without apparent benefit to the NLRB counsel involved in this case, but we find no basis for reaching a different view than that expressed in *Rogers*.

CONCLUSION

With its liability based on alternative NLRB holdings, Banta has launched a barrage of attacks in this petition for review. Although we find Banta's claims without merit, it seems equally clear that the blame for much of the confusion in this case must be laid on the NLRB. It was the Board's delay in approving the Settlement Stipulation that gave Banta cause to seek withdrawal from that agreement, thus creating the complications for this litigation of *Banta I*. It was the NLRB counsel's "misunderstanding of applicable law" during the proceedings before the ALJ that gave Banta cause to argue that its due process rights had been violated. Finally, we must observe that the Board's opinion in this case is hardly a model of clarity, and that footnote 4 of that opinion poses an insolvable conundrum. Because of this inartfully drafted footnote, it is simply not possible to know whether the Board's affirmance of the ALJ is based only on the Settlement approved in *Banta I*, as Banta argues, or on the statutory requirements of the Act as well.

The explanation for the presence of footnote 4, of course, is obvious. The NLRB saw no reason to reach the ALJ's finding that the strike was economic; with this exception, the Board affirmed the ALJ's opinion "in its entirety." Whether this had the accidental effect of limiting the Board's affirmance to the basis of the Settlement rather than the Act is not a question we need to decide, however, because we are satisfied that either basis is sound. Banta's PRS was unlawful because it gave pref-

erential reinstatement and seniority rights to one class of employees simply because those employees had abandoned the strike before the strike ended. Banta fully appreciated the nature of the charges against its PRS, and was not prejudiced by the fact that the legal issues were the same under either the Settlement or the Act. The NLRB's complication of what should have been a straightforward case has given Banta any number of apparent footholds in its challenge to the Board's order, but on careful consideration these footholds cannot be maintained. Accordingly, the Board's order must be enforced.

Enforcement granted.

APPENDIX B

FJZ

256 NLRB No. 55 D—7751
Appelton and Menasha, WI

UNITED STATES OF AMERICA

Before the National Labor Relations Board

George Banta Company, Inc., Banta Division and Tri-Cities Local 382,[1] Graphic Arts International Union, AFL—CIO	Cases 30-CA-4396, 30-CA-4543-1, 30-CA-4543-2, and 30-CA-4543-3

DECISION AND ORDER

On October 15, 1979, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a brief in opposition to exceptions of Respondent and in support of its cross-exceptions and Respondent filed an answering brief in support of certain findings of the Administrative Law Judge excepted to by the General Counsel, as well as an answering brief in support of certain portions of the Administrative Law Judge's Decision excepted to by the Charging Party.

[1] The parties have stipulated that on March 5, 1978, Graphic Arts International Union, Local 88L, AFL-CIO-CLC, and Graphic Arts International Union, Local 32B, AFL-CIO-CLC, charging parties in this proceeding, merged to form Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO. The caption has accordingly been amended to reflect that stipulation.

The Board has considered the record and the attached Decision in light of the exceptions[2] and briefs[3] and has decided to affirm the rulings, findings, and conclusions[4] of the Administrative Law Judge and to adopt his recommended Order.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, George Banta Company, Inc., Banta Division, Appelton and Menasha, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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[2] Pursuant to our Order of June 1, 1981, approving an all-party settlement stipulation with regard to the discharges of Alan LaSelle, Robert Fox, and Richard Ahrens, and having been notified by the Regional Director for Region 30 of Respondent's compliance with the terms of said stipulation, all exceptions and cross-exceptions relating to those discharges are deemed withdrawn. Accordingly, we do not pass on the merits of the Administrative Law Judge's dismissal of allegations of the complaint relating to the alleged unlawful discharge of those three individuals.

[3] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

[4] Inasmuch as we find the reinstatement rights of the strikers herein to have been determined by our Decision and Order in *George Banta Company, Inc., Banta Division,* 236 NLRB 1559 (1978), enfd. 604 F.2d 830 (4th Cir. 1979), cert. denied 100 S. Ct. 1312, 103 LRRM 2795 (1980), we find it unnecessary to reach or pass upon the issue of whether Respondent and the Charging Party had reached a bargaining impasse or whether the ensuing strike was an economic or an unfair labor practice strike.

[5] The Charging Party contends that the Administrative Law Judge's Order should be clarified and that the Board should require Respondent to reimburse the Charging Parties for the expenses of this proceeding. We find the remedy recommended by the Administrative Law Judge adequate and therefore adopt his recommended Order.

Dated, Washington, D.C. July 16, 1981

John H. Fanning, *Chairman*

Howard Jenkins, Jr., *Member*

Don A. Zimmerman, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD-684-79
Appelton and Menasha, WI

UNITED STATES OF AMERICA

Before the National Labor Relations Board

Division of Judges

Banta Division, George Banta Company, Inc.	
and	Case 30-CA-4396
Graphic Arts International Union, Local No. 88L, AFL-CIO-CLC, and Graphic Arts International Union, Local No. 32B, AFL-CIO-CLC	
Banta Division, George Banta Company, Inc.	
and	Cases 30-CA-4543-1, 30-CA-4543-2, and 30-CA-4543-3
Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO-CLC	

John Loomis and *Paul Bosanac, Esqs.*, for the General Counsel.
Thomas Allison, Esq., for Charging Party.
Michael J. Rybicki, Robert Watson and *R. Theodore Clark, Esqs.*, for Respondent.

DECISION

FRANK H. ITKIN, Administrative Law Judge. The above consolidated unfair labor practice cases were tried in Appelton and Menasha, Wisconsin, commencing on August 21 and ending on November 7, 1978. Unfair labor practice

charges were filed by Local 88L and Local 32B in Case 30-CA-4396 on October 20, 1977, and were amended on November 10, 1977. A complaint was issued on March 8, 1978, and was later amended on March 31, 1978, and during the hearing. Unfair labor practice charges were also filed by Local 88L, Local 32B and Local 382 in Cases 30-CA-4543-1, 30-CA-4543-2 and 30-CA-4543-3 on February 6 and March 16, 1978. A complaint was issued on April 6, 1978. The proceedings were later consolidated.[6]

Respondent Employer is engaged in the printing and bookbinding business at its facilities in Menasha, Wisconsin. It is undisputed that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act. It is also undisputed that Local 88L and Local 32B, which have since merged to form Local 382, are labor organizations within the meaning of Section 2(5) of the Act. Background facts and related litigation between the parties were summarized by the United States Court of Appeals for the Fourth Circuit in *George Banta Company, Inc., Banta Division* v. *N.L.R.B.*, No. 78-1437, decided August 6, 1979, in pertinent part as follows:

* * *

> Banta is engaged in the printing business and maintains two production facilities in Menasha, Wisconsin. Two groups of employees at these facilities, bindery and lithographic workers, are represented by the Graphic Arts International Union, AFL-CIO,CLC. In February 1977, Banta and the Union began negotiations for a new collective bargaining agreement to replace the existing one which was due to expire April 4, 1977. Negotiations continued until April 4, 1977, when Banta announced that it was immediately implementing its "last contract offer", including provisions for lengthening the work week and

[6] The unfair labor practice charge in Case 30-CA-4543-3 was filed by Local 382. The parties have stipulated that Local 32B and Local 88L merged on March 5, 1978, to form Local 382.

limiting Employer contributions to a health insurance plan. On the same day, the Union membership voted not to work under the Company's unilaterally imposed terms and began a strike.

The Union subsequently accused the Company of unfair labor practices, resulting in a complaint filed by the NLRB Regional Director on June 27, 1977. The complaint charged Banta with violating Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act * * * by unilaterally changing wages, hours of work and other terms of employment at a time when negotiations between the parties were continuing and when no bargaining impasse had occurred. It also characterized the resulting strike as an unfair labor practice strike. A hearing on the complaint was scheduled for July 11, 1977. In addition, the Regional Director was granted Board authorization under Section 10(j) of the Act * * * to seek injunctive relief in the district court to require recission of the alleged unfair labor practices pending resolution of the charge.

The scheduled hearing was never held and the authorized injunctive relief against the Company was never sought. Instead, Banta entered into settlement negotiations with the NLRB Regional Director and on July 22, 1977, the Company signed a settlement stipulation. The Company agreed in the settlement, *inter alia,* to revoke implementation of its "last contract offer" of April 4, 1977, and to "revert to the wages, hours of work and other terms and conditions of employment which existed prior thereto, but excluding cost-of-living adjustments, arbitration procedure and union security." The stipulation contains a nonadmission clause, and does not expressly state that the strike was the result of unfair labor practices by the Company. However, the agreement includes a statement of the striking employees' reinstatement rights, which coincide precisely with those of unfair labor practice strikers [Footnotes omitted.]

* * *

Initially, as the Court further noted, the Union had objected to this settlement agreement. However,

While the settlement agreement was thus progressing toward final Board approval, collective bargaining negotiations between Banta and the Union had resumed. On September 7, 1977, the Company notified the Union that it was partially implementing the terms of the settlement stipulation. In a notice utilizing the exact language of the stipulation, Banta revoked implementation of its April 4 "last contract offer" and reverted to the previous conditions of employment as specified in the stipulation.

On October 8, 1977, following meetings at which the provisions of the settlement stipulation were explained to the Union membership, the Union signed the stipulation. The Union notified Banta that it had now joined in the settlement agreement and, in the same letter, accepted Banta's most recent contract proposal, reserving the right to challenge the proposal's reinstatement plan as not complying with the settlement stipulation or the relevant law. Banta accepted the striking employees' unconditional offer to return to work and immediately resumed production operations.

On October 20, 1977, the Union filed new unfair labor practice charges against Banta [*Banta II*] [the instant proceeding], accusing the Company of violating both the National Labor Relations Act and the terms of the settlement stipulation by massive discrimination against returning employees who had participated in the strike. Five days later, Banta notified the Board that "in light of the great delay in approving the settlement * * * and due to new issues relative to the settlement raised in [*Banta II*], effective immediately the Employer withdraws its offer of settlement."

Following extensive arguments by all parties, the Board, on July 14, 1978, refused to permit the Company to withdraw from the stipulation and entered its order enforcing the agreement's terms. 236 NLRB 224 (1978).

The Court, Circuit Judge Bryan dissenting, held that the Board properly rejected the Employer's attempted withdrawal from the settlement stipulation and, consequently, enforced the

Board's order. In rejecting the Employer's various contentions, the Court stated with reference to the instant proceeding:

* * *

> Banta's final argument concerns the effect of *Banta II*, the litigation based on the Union's October 20, 1977 charge that the Company's method of reinstating returning strikers constituted an unfair labor practice.
>
> The *Banta II* complaint characterizes the 1977 strike as an unfair labor practice strike, resulting from Banta's April 4, 1977 action in "unilaterally chang[ing] wages, hours of work and other terms and conditions of employment * * * at a time when negotiations between the parties were continuing and at a time when bargaining impasse had not occurred." The complaint then charges Banta with the following violations of Section 8(a)(3) and (1) of the Act:
>
> > (a) On or about October 10, 1977, and thereafter, Respondent granted, and continues to grant, preferential reinstatement rights or preferential seniority rights to jobs and rates of pay to those employees who had abandoned the above-described strike and who offered to or did return to work at Respondent before the Charging Parties abandoned the strike against Respondent.
> >
> > (b) On or about October 10, 1977, and thereafter, Respondent denied seniority and the benefits of seniority for purposes of job assignment and computation of rates of pay to those employees who had engaged in the strike against Respondent until abandoned by Charging Parties.
>
> At the hearing on these charges, the General Counsel sought to introduce evidence that the Company's April 4 action constituted an unlawful refusal to bargain and that the resulting strike was an unfair labor practice strike. The General Counsel stated that he "does not seek any remedial relief for the 8(a)(5) violation of April 4, 1977. Evidence of [this violation] will be used by General Counsel only as background to throw light on Respondent's conduct in granting superseniority to those employees

> who prematurely abandoned the Unions' strike * * * [and] to properly analyze the rights of the six strikers discharged for alleged strike misconduct." The Administrative Law Judge presiding at the hearing refused to admit this evidence, ruling that "these matters have been disposed of by the Board's Decision and Order [enforcing the settlement stipulation] and the obligation imposed thereby." The Board reversed the ALJ, and ordered him to receive the evidence "for background purposes."
>
> * * *

The Court concluded that "any objections Banta may have to the scope of the *Banta II* litigation should be raised in that litigation."

In sum, General Counsel alleges in the instant proceeding that on or about April 4, 1977, the Employer—in violation of Section 8(a)(5) and (1) of the Act—unilaterally changed wages, hours of work and other terms of employment of employees represented by Locals 88L and 32B by announcing implementation of and by implementing its "last contract offer" at a time when negotiations between the parties were continuing and bargaining impasse had not occurred[7]; that on or about April 4, 1977, the Unions instituted a strike against the Employer and unit employees engaged in this strike until on or about October 8, 1977; that this strike was caused and prolonged by the Employer's unfair labor practices; and that subsequently, on or about October 10, 1977, the Employer—in violation of Section 8(a)(3) and (1) of the Act—granted preferential reinstatement rights or preferential seniority rights to jobs and rates of pay to those employees who had abandoned the strike and who had offered to or did return to work before the Unions had abandoned the strike against the Employer and, in addition, also denied seniority and benefits of seniority for purposes of job assignment and computation of

[7] General Counsel seeks no remedy for this violation in this proceeding.

rates of pay to the employees who had engaged in the strike until it was ultimately abandoned by the Unions. General Counsel also alleges that the Employer—in further violation of Section 8(a)(3) and (1) of the Act—discriminatorily discharged six striking employees on various dates from late November 1977 to late January 1978.[8] And, General Counsel alleges that the Employer—in further violation of Section 8(a)(3) and (1) of the Act—"engaged in a course of conduct" from on or about October 25, 1977, "designed to deny seniority, pay and other rights and privileges to strikers who remained on strike until their bargaining representative offered on their behalf to return to work, by seeking to withdraw from the Board settlement stipulation" in *Banta I,* as recited above. Respondent denies, *inter alia,* that it has violated the Act as alleged.

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs of all counsel, I make the following findings of fact and conclusions of law:

Findings of Fact

I. The Unions And The Employer Commence Bargaining On February 2, 1977; The Employer Implements Its Last Contract Offer On April 4, 1977; The Unions Strike The Employer Until October 8, 1977

During early 1977, Local 88L represented some 350 lithography employees and Local 32B represented some 400 bindery employees employed at Respondent's Menasha facilities.[9] The Employer and the Unions commenced bargaining for new agreements on February 2, 1977. Local 32B engaged

[8] 1. Richard Pontow
2. Alan LaSelle
3. Richard Ahrens
4. Donald Bojarski
5. Robert Fox
6. Dean Schreiner

[9] The separate appropriate units, as specifically alleged in General Counsel's consolidated complaints, are not in dispute.

in approximately 13 bargaining sessions with the Employer between February 2 and April 4. Local 88L engaged in approximately 10 bargaining sessions with the Employer during this same period. The evidence pertaining to these sessions is summarized below.

A. *February 2, 1977 session with Local 32B*

Leatrice Schmeling, president of Local 32B, was the chief negotiator for her Union at this first session. John Hue, the Employer's director of labor relations, was the chief negotiator for the Company. Following preliminary statements of position and the Company's presentation of supporting chart data, the Company presented its written proposal to Local 32B (see G.C. Exh. 35). This proposal contains, *inter alia,* a number of substantial modifications to the existing contract between the parties. The proposed modifications include the following:

1. A 44-month contract expiring in December 1980. Earlier contracts with Local 32B expired in April which was the Employer's busy season. These earlier contracts were for 24 or 36-month terms.

2. A combination of the Employer's stockroom and sheeter sections into one department.

3. The allowance of non-unit personnel to perform unit work when qualified bargaining unit employees are unavailable to perform such work.

4. Changing the existing 35-hour work week to a 38-hour work week.

5. Changing the computation of doubletime pay to commence after 4 hours of overtime instead of after 2 hours of overtime and related reductions in overtime opportunities for unit employees.

6. Modification of the right of employees to compensation after reporting for work under certain circumstances.

7. Providing a 30-day probationary period for new employees to become eligible for holiday, bereavement or jury-duty pay.

8. Limiting the "rate retention" of employees classified as "displaced persons" to a period of 4 weeks instead of a permanent rate-retention as provided in the old contract.

9. Changing the vacation term from a calendar or anniversary basis to an April-to-April basis.

10. A cut-off or freeze in the Company's contribution to health insurance and the inclusion of a $50-deductible for hospital and surgical coverage. All increases in future health insurance costs would be paid by the employees.

11. No wage increases during the 44-month term of the agreement.

12. Amendments to the grievance and arbitration clauses, amendments to the strike and lockout clauses imposing increased liability on the Union and expansion of subcontracting provisions.

13. Downgrading manning requirements, the elimination of jobs and the addition of a new and lower wage classification.

14. Providing a maximum $200 per week sick leave benefit and related benefit reductions.

In addition, as Company representative Hue testified: "Our proposal was to freeze wages as they were at the present time with no additional increases, even a general increase or cost-of-living increase, any kind of increase." The bookbinder employees, under the existing contract, had received semi-annual cost-

of-living payments. The existing contract with Local 32B would expire on April 3, 1977. If that contract were extended, according to Hue, the next cost-of-living payment for these unit employees would be due "with wages beginning April 4, 1977."

Local 32B then presented its written proposal to the Employer (G.C. Exh. 37). The Union's proposal included, *inter alia,* the following:

1. A 2-year agreement expiring in April 1979.

2. Changes pertaining to Friday work for employees who were required to work on Saturday.

3. Provisions that belt binder employees working through their lunch hour would receive premium pay.

4. Increases in certain shift differential.

5. Language changes pertaining to temporary transfers.

6. A "floater" holiday and Good Friday holiday.

7. Safety and sanitation language.

8. The requirement that vacancies be filled within 5 workdays after posting and a 10-day training period.

9. Changes in recall rights of laid off employees, 4 weeks severance pay in the event of a permanent layoff and related changes.

10. An increase in certain vacation benefits and an extension of bereavement pay.

11. The addition of a dental plan as part of the health and welfare package, increased life insurance coverage, increased health insurance benefits for retirees and related provisions.

12. Changing the accrual of the cost-of-living allowance to quarterly instead of semi-annually.

13. Upgrading of certain manning.

14. A general wage increase of 6 percent each year of the contract.

15. An increase in the amount of pension payments and related provisions.

At this initial session, Company representative Hue stated (G.C. Exh. 48(a)):[10]

> In previous negotiations the Company always has said that it had some money to put into negotiations. [Hue] stated that the Company is not saying this at the present time. He continued that that was the reason why the Company opened negotiations this year, and that even if the Union had wanted to extend the present contract for one year, the Company would still have asked that the contract be reopened.

Hue also said "that what the Company was suggesting is that the Union take back to its membership the week ending March 18, 1977, a proposal they can vote on" *(Ibid.)* Union representative Schmeling responded to the Employer's proposed elimination of any cost-of-living adjustments and general wage increases by stating: "If the Company maintains its position as indicated today, the Company may well notify the customers of an oncoming strike, as her members would never accept a proposal as discussed today" *(Ibid.)* However, as Hue acknowledged, there was no "substantial bargaining" at this first session; "most of the time was spent on the submitting of proposals." Schmeling similarly recalled: "Each side read through its own proposal"; there was "brief discussion only, because it was read more or less for clarification * * * *."

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[10] G.C. Exh. 48 contains the Company's bargaining notes for its sessions with Local 32B. G.C. Exh. 49 contains the Company's notes for its sessions with Local 88L. G.C. Exh. 41 contains Local 32B's notes and G.C. Exh. 66 contains Local 88L's notes for these same sessions.

B. *February 8, 1977 session with Local 88L*

Robert Miller was the main spokesman for Local 88L and John Hue was the main spokesman for the Employer at this initial session with Local 88L. This first meeting between Local 88L and the Employer mirrored in large part the February 2 session between Local 32B and the Employer. Similar preliminary remarks and presentations were made. The Company's written proposal (G.C. Exh. 52) in significant part paralleled its written proposal to Local 32B. The Company's proposal included the following:

1. A 44-month contract.
2. A 38-hour work week.
3. Doubletime after 4 hours of overtime.
5. Changes in the layoff clause and recall provisions.
6. Changes in vacation provisions.
7. Permitting non-unit personnel to perform production work under certain circumstances.
8. Eliminating the "chain shop" clause which pertained to work from struck facilities.
9. Enlarging the subcontracting clause, modifying the lockout-strike provisions and modifying the arbitration language.
10. Establishing a 30-day probationary period for new employees in certain respects.
11. Freezing the Company's health insurance contributions and establishing a $50 deductible benefit requirement.
12. Establishing a "stable crew" system to replace the existing "move-up" system for filling temporary vacancies, and reduction of manning.
13. Adding a new and lower wage classification.
14. Establishing a $200 sick benefit limit per week and related provisions.

Further, as the Company's bargaining notes show (G.C. Exh. 49(a)), Union representative

> Miller stated that he did not see anything on cost-of-living or wage increases in the Company's proposal. [Company representative] Hue replied that the Company proposal does not include any additional wage increases and the Company feels the present rates are at the top of the pile.

Local 88L then presented its proposal (G.C. Exh. 53). This proposal included:

1. A 2-year contract expiring in April.
2. Enlargement of Union access provisions.
3. Changes in overtime provisions.
4. Modifications in the Employer's right to hire temporary employees as substitutes in certain circumstances.
5. Additional holidays and related provisions.
6. Changed vacation rights and related provisions.
7. Enlargement of the bereavement pay clause.
8. No wage increase except for locking in cost-of-living allowances. Unlike Local 32B which had a cost-of-living adjustment due on April 4, Local 88L members did not have their cost-of-living adjustment due until May 1977.
9. Changed retirement provisions.
10. Changed insurance and pension benefits.

Company representative Hue recalled that the Employer had placed approximately 30 proposals "on the table" at its first session with Local 32B and at its first session with Local 88L. Hue also recalled that the two Locals had placed approximately an equal number of proposals "on the table" at these initial sessions. See, generally, G.C. Exh. 49(a).

C. *February 9, 1977 session with Local 32B*

Local 32B representative Schmeling noted at this second session that she was "quite amazed at the number of the Company's proposals, which she said totalled 38." Schmeling commented that "all she saw in the Company's proposal was economy"—"if the Company feels their proposal is going to be bought as it is written they were going to be in for a surprise." However,

> Schmeling continued that the Union would try to move on some of the Company's proposals and would be accepting some of these today.

See, generally, G.C. Exh. 48(b).

The parties then went through the Company's proposals and the Union's proposals, "item for item." Schmeling indicated, *inter alia,* that the Company's proposal "concerning gender designation was acceptable"; the Union "would also accept [the] proposal concerning jurisdiction of combining the Midway stockroom and sheeter into one department"; the Union "would accept" the Company proposal pertaining to jurisdiction language concerning the Menasha facility; the Union "would accept" certain Company language pertaining to "hours of work"—the Union "was willing to remove the language whenever possible from" the particular clause; the Union "would withdraw their proposal for changing the weekly posting of the work schedule * * * and would also okay the Company's proposal concerning change of shift schedule"; a Company proposal "on machinery was accepted by the Union"; the Company's proposal "concerning the pension was okayed by the Union wherein the Company would make the appropriate changes required by ERISA"; and the Company proposal "concerning the sick benefit plan and excluding coverage to those people engaged in self-employment was okayed by the Union." In addition, a Company proposal "concerning seniority was modified by the Union". Union

representative Schmeling stated "that the Union would be acceptable to going 60 working days where it now states 4 months and 90 days * * *." Also, the Union indicated "that perhaps if the Company would add some additional language to [its proposal] concerning calling in, etc., it possibly could be acceptable to the Union" (*Ibid.*)[11]

Company representative Hue recalled that at this session the Employer "advanced its proposals on [the] four major items" and neither party "changed its position with respect to any of those items at the session." Hue was referring to the Company's proposals pertaining to the 44-month term of the agreement; the 38-hour work week; the freezing of or cut-off in paying increased health insurance costs; and the elimination of any wage increase or cost-of-living adjustment.[12] Hue acknowledged that he had "stated that the Company was prepared to review the Union's proposal. However, those items that dealt with economics should be deferred. * * * The Company was in no position to discuss any economic issues today". Hue also acknowledged that Schmeling, after reviewing the Union's

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[11] Union representative Schmeling noted at this session "that a person off on maternity leave should have the same rights for posting as others who are on vacation, sickness or jury duty." Company representative Hue "said yes, that the Company would add maternity leave to [its] posting requirements". Hue also indicated general agreement with a Union proposal under wages and layoffs for temporary transfers—Hue "advised that the Company would write up something concerning this addition." Hue indicated general agreement with the Union's proposal to give "superseniority" to the Union's recording secretary; that he would "reconsider" the Union's proposal concerning filling posted vacancies within 5 days; that he had "no objection" to the Union's proposal on seniority dates and permanent employee status; and that he "would agree to delete this [materials assembly] classification." See GC. Exh. 48(b).

[12] Hue recalled that he was asked at this session: "if I was sure that the Company's position was that they would not make a cost-of-living payment effective April 4, the one [the Union] had * * * earned". Hue responded: "Our proposal was to keep wages just as they were at that time."

proposals, "stated that the rest of the Union's proposals concerned economics". Hue stated "that between now and the next meeting he would write up those items that the Company and the Union have tentatively agreed to, and these would be signed at the next meeting." See G.C. Exh. 48(b).

D. *February 15, 1977 session with Local 88L*

This second bargaining session between Local 88L and the Employer parallels in some respects the second session with Local 32B, as summarized above. See G.C. Exh. 49(b). Union representative Miller "stated that the Union would be willing to proceed with the Company's proposal." Company representative Hue "suggested that the parties initial those items agreed to * * *" which were "gender designation" and the designation of the "preparatory department". Hue later "stated that he would like to address himself to those items where changes occur in the Union's proposal * * *". Hue subsequently noted that "there appears to be 22 Union proposals which have some type of cost attached to them even though the Union did not propose any wage increase." Hue also "stated that the Company wishes to give a presentation to the stable crew concept along with some background and examples." A discussion followed. Hue further "suggested that perhaps a subcommittee be appointed to review the stable crew concept and report back to the main body." Thereafter, the "parties reviewed the Union's proposal and in the areas of no change the parties agreed to remove [them] from the Union proposal * * *". Miller "stated that the Union agrees that the Company can reinsert" its management-rights clause "back into the contract". Hue responded to the Union's "requested clarification" of "some areas of the Company proposal." See G.C. Exh. 49(b) and G.C. Exh. 66(b). In addition, Hue also testified that at this session the so-called four "major issues" were discussed and neither party modified its position on these issues.

E. *February 16, 1977 session with Local 32B*

This was the third bargaining session between the Employer and Local 32B. See G.C. Exh. 48(c). Company representative Hue gave Union representative Schmeling "the 10 tentative proposals as agreed to last week". Hue further stated "that he had rewritten the grievance procedure and presented the Union proposal concerning that." The Employer "passed out a new unit and departmental seniority lisitng for the stock and sheeter departments, which had been agreed to be combined within one department." And, as the Company's bargaining notes further show (*ibid*),

> Hue then stated that this morning the Company had a full presentation to make concerning the ganging of perfect binders and the removal of the c and e classification people on specific Midway equipment.

A presentation and discussion followed. See R. Exh. 40, the Company's written "explanation" presented to the Union at this session.

Subsequently, Union representative Schmeling "stated that [a] Company proposal" pertaining to overtime "was acceptable to the Union". G.C. Exh. 48(c). The Company "added additional language which would further clarify" its proposal concerning "events beyond the control of the Company" language. The Company also manisfested that "it was willing to modify its proposal" pertaining to trial periods. Schmeling responded "that the Union would look at this proposal and advise during the next meeting." The parties discussed, *inter alia,* the Company's proposal pertaining to the vacation term; the grievance process; no-strike clause; subcontracting provision; a new and lower wage classification; and sick benefit provision. The Union withdrew its proposal for "a language change that when the holiday fell on a certain day * * * they would receive their pay on a certain day." The Union also withdrew its proposal pertaining to the safety and sanitation

clause. Further, the parties discussed the Union proposal pertaining to log books; full Friday work in the event of overtime on Saturday; temporary transfers; recording secretary seniority; and severance pay (*Ibid.*)[13]

Company representative Hue further claimed that "at this session the Company once again discussed its proposals on the four major items" and neither party modified their position. The Company's bargaining notes (G.C. Exh. 48(c)) and related testimony show that Union representative Schmeling stated, *inter alia,* that there "was very little movement on the part of the Company"; "it appears the Union is wasting its time talking to the Company"; "if the Company does not want to get serious then perhaps the Union should cancel the meeting next week"; the "Company's proposal was ridiculous"; and "in the Company's proposal there were a lot of areas which the Union would not move on." In addition, the Company's bargaining notes of this session further show:[14]

> Hue responded that there were no proposals engraved in stone and that these proposals led us to an objective which we need to become competitive. He continued that any one or group could be thrown out if there was another way that the Company could become competitive. Hue continued that that was what negotiations [were] and perhaps alternative methods could be found * * *.
>
> * * *
>
> [Company representative Emmrich] added that we have told the Union committee that there was room for dis-

[13] The Company's bargaining notes for this session (G.C. Exh. 48(c)) reflect that Company representative Hue "commented that the rest of the Union's proposals did concern economics".

[14] Union representative Spielbauer similarly commented: "* * * most of the tentative agreements signed today really meant nothing * * *" (*Ibid.*) Union representative Schmeling noted that "the Union was willing to bargain but it was not going to accept a 44-month contract" and was not "going to accept a contract that didn't have the cost-of-living increase" (*Ibid.*)

cussion and that these items could be modified as long as the Company were to get a favorable end result.

* * *

F. *February 21, 1977 session with Local 88L*

This was the third session between Local 88L and the Employer. Company representative Hue stated that he has "drafted five tentative agreements for the Union's consideration" and "also has drafted some language regarding the grievance procedure." Union representative Miller "stated that the Union is in agreement with [enumerated] tentative proposals * * *". Cf. G.C. Exh. 49(c) and G.C. Exh. 62, pp. 1-6.[15] There was a discussion of proposals pertaining to, *inter alia*, grievance procedures; the stable crew concept; overtime; training fund; new and lower wage classification; Union access; inability to report to work; substitutes; bereavement pay; and substitute supervisors.

The Company's bargaining notes (G.C. Exh. 49(c)) show:

> [Union representative] Miller stated he does not feel the parties can meet next week because the International representative is not available and further feels that the group is at the point where he is needed.
>
> [Company representative] Hue stated that the International cannot help us here with our problems, as only the two groups can resolve them.[16]

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[15] G.C. Exh. 62 contains tentative agreements reached between Local 88L and the Employer during the negotiations.

[16] The Union's bargaining notes (G.C. Exh. 66(c)) also show Miller stating at the close of this session:

* * *

Will have to discuss economics pretty soon.
Might not be able to meet next week.

* * *

(Footnote continued on following page)

G. *February 23, 1977 session with Local 32B*

Company representative Hue, at this fourth session with Local 32B, "presented Schmeling with the tentative agreement he had written up concerning adding pregnancy to those clarifications when posting"; the "tentative agreement concerning deletion of materials assembly from the contract"; a "tentative agreement concerning the employee contacting the Company 2 years prior to retirement"; and a "tentative proposal concerning adding the recording secretary of the Union to the superseniority list". See, generally, G.C. Exh. 48(d). The Company also generally agreed with the Union's proposal that "the successful bidders could be designated" 5 days after posting (*Ibid.*) Further, as the Company's bargaining notes for the session also show:

> Hue stated that towards the end of the last meeting some irritation and impatience were noted from the Union. The Union said that it believed what the Company was saying; however, the Union's action seemed to indicate that it wanted to get on with some money proposals. The proposals which the Union is suggesting regarding economics are in direct conflict with the Company's proposals.
>
> Hue stated that perhaps it was time to take a fix on these negotiations as to exactly where we were. The Company is not dragging its feet and would be happy to continue looking at the Union's proposals for 16 weeks and continue to say no if that were necessary.
>
> Hue asked if the Union wanted to talk about the Company proposals today and get the rationale for these proposals or talk from the Union's proposals.

* * *

(Footnote continued from preceding page)

I note, however, that Company representative Hue, in his testimony, recalled that there was in fact "discussion at this session of the four major items"; neither party modified its position; and no agreement was "reached on those items."

Union representative Spielbauer commented: "The Union could not buy some of the Company's language and * * * perhaps if some language changes were made the Union may be able to accept it". Both parties agreed that all proposals were now "on the table" (*Ibid.*)

During the ensuing discussion (see G.C. Exh. 48(d)), Hue indicated that the Company's proposed 38-hour week "would be at the regular hourly rate rather than the employees working for the same weekly wages." Schmeling "responded that after our people have been working a short Friday, you can't honestly believe they would go back to a long Friday". Union representative C. Douglas added: "35 hours isn't what the Union's question is".[17] Further, as the bargaining notes also show:

> Hue added that if the Union's question is 38 hours *via* 7 hours and 36 minutes a day, this could be modified to some other formula as long as it still retained the 38 hours within one work week.
>
> Schmeling stated that the Union would discuss this further if the Company could think of something else to keep the short Fridays.
>
> Hue responded that if that's the Union concern, something could be worked out on this possibly.

The parties thereafter discussed, *inter alia*, the Company's proposal pertaining to overtime; rate-retention; temporary help; leave of absence; subcontracting; a new and lower wage classification; manning; and vacations (*Ibid.*) The Company agreed that its $50-deductible proposal on hospital benefits "could be dropped". The parties also discussed at length "a change in [health insurance] carriers" in connection with its

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[17] Douglas subsequently stated that the "loss of a 5-hour Friday is one of the things that could cause a strike". And, Hue also remarked: "One of the most important weapons which Management has in labor negotiations is the strike, just as it is one of the Union's most important weapons" (*Ibid.*)

proposed freeze on paying insurance costs. And, as the Company's bargaining notes show,

> Hue stated that on the insurance question, the Company is not married to the proposal it has written. The Company is looking for something better than what is has now and is open to counterproposals.

In addition, Schmeling stated that the Union will accept a Company modified proposal pertaining to seniority. The parties also reached a tentative agreement on the grievance procedure "which could be looked at the next meeting" and the no-strike clause.[18]

H. *February 28, 1977 session with Local 88L*

Mel Galbraith, the Union's International representative, attended this fourth session between Local 88L and the Company.[19] Jerry Hensler, a Company representative, made a lengthy presentation pertaining to the Employer's insurance proposal. See, generally, G.C. Exh. 49(d). Later, Company representative Hue "stated that the Company has prepared another proposal on grievances for the Union's consideration". Hue also had prepared proposals pertaining to arbitration; changing department to classification; and educational training. There was, as the Company's bargaining notes further reflect (*ibid*), discussions pertaining to proposals relating to Union

[18] Although Company representative Hue acknowledged that the Employer's notes for this session "reflect no discussion whatsoever of" cost-of-living, wages, and contract term proposals, Hue recalled that these items were in fact discussed at the February 23 meeting. Hue explained that the Union insisted that "they have to have these things and the Company [said] we can't give them to you."

[19] Galbraith, as discussed below, attended the subsequent sessions involving both Local 88L and Local 32B. In addition to the bargaining notes of the Locals and the Employer for these sessions, Galbraith submitted written reports to his International which, as quoted below, also reflect what transpired at these sessions.

access; inability to report to work; seniority; vacations; grievance procedures; new machines; leave of absence; chain shop clause; subcontracting; and no-strike and lockout clauses. Agreements were reached pertaining to the subjects of Union access; holidays; inability to report to work; grievance procedures; International Union responsibility; overtime; hours of work; vacations; and operation of equipment. There was also agreement reached relating to arbitration; changing department to classification; and educational training.

Company representative Hue, in his testimony, claimed that the four so-called "major items" were again discussed at this session and neither party modified its position. International representative Galbraith, in his testimony, generally acknowledged, as follows:

* * *

Q. And you testified earlier with respect to 88L that these four major items were discussed at all the bargaining sessions you were at with 88L. Between the time you entered negotiations and the time of the strike, was there some discussion of each of those items at the bargaining sessions thereafter?

A. Yes.

I. *March 2, 1977 session with Local 32B*

International representative Galbraith entered Local 32B's negotiations at this fifth session on March 2, 1977. According to the Company's bargaining notes (G.C. Exh. 48(e)), Union representative Schmeling and Company representative Hue, as well as Nile Emmrich, engaged in a heated exchange at the opening of this session. Schmeling accused Management representatives, *inter alia*, of "going around telling the feeders that they aren't worth the money they are receiving"; she accused the Company of not bargaining in good faith; she told Hue that he "could go pound salt up his ass"; she said "that the

Union does not want strike"; she stated that the Company "should take the garbage off the table and get down to business"; and she warned that "her members won't go backwards * * * they would rather go on welfare than take the proposal the Company has offered."

In addition, as the Company's bargaining notes also show (*ibid*), the Company thereafter dropped the proposal pertaining to the subject of relief of counterparts. Hue also "stated that in accordance with the discussions between the Union and the Company, Hue has rewritten the grievance procedure and asked the Union to take a look at it" (*Ibid.*) Further, Hue "presented a tentative proposal concerning the 40-day language" relating to the subject of seniority and trial periods. Hue had modified the Employer's proposals concerning leave of absence and holidays. The parties discussed the Company's vacation proposal and signed tentative agreements concerning trial periods and holidays. See R. Exh. 19. The Union also dropped various of its proposals. The Company's notes indicate that Schmeling stated: "the rest of the Union's proposals were economics." Later, after a lunch recess, Schmeling further "stated that the Union would agree to the modifying language which the Company added to the Union's proposal concerning temporary assignments and transfers." There was agreement on temporary industrial accident language and assignments and transfers (*Ibid.*)[20]

In addition, Hue testified that the parties again reviewed the so-called "four major issues" at this session and neither party changed its "position." Cf. R. Exh. 45, Galbraith's report to the International pertaining to this session, where he notes:

---

[20] The Company's notes record Hue stating at the close of the session: "* * * our customers have made the March 21 date an important date in these negotiations and the Company would like very much to wrap up negotiations next week." Schmeling "stated it would be a miracle if a contract could be signed by April 1, 1977 * * *." G.C. Exh. 48(e).

* * *

> At first I could hardly believe they were sincere in their position but it looks more and more like they want to let the work out and have massive layoffs in order to get the type of contract they desire, using the old western trick of economic pressure on members.

Galbraith's earlier March 1 comments to his Union are also pertinent (*ibid.*): "The Company is not proposing as many changes, but it runs down the line in similarity, such as 44-month contract with no wage increase, 38 hour work week and reduced manning."

J. *March 7 and 8, 1977 sessions with Local 88L*

The fifth and sixth sessions between Local 88L and the Company were on March 7 and 8, 1977. As the Company's notes for March 7 show (G.C. Exh. 49(e)), the parties reviewed and signed drafts of earlier tentative agreements. See G.C. Exh. 62. Union representative Miller "asked if the Company has given any additional consideration to grievance procedure language. Hue replied that the Company will accept the original proposal as presented by the Union without any modifications". G.C. Exh. 49(e). There was discussion concerning grievance questions; strike and lockout language; recall rights; seniority retention upon advancement to supervisor; shop committee language; leave of absence; and temporary supervisors. The Employer dropped its demands for a $50 deductible for hospital and surgical benefits, and probationary time for new employees. Further, as the Company's notes show (*ibid*), the parties also generally agreed to compromise language pertaining to leave of absence; shop committee; no strike and lockouts; and retention of seniority upon promotion.

The Company's bargaining notes for the March 8 meeting (G.C. Exh. 49(f)), show:

> Hue opened by stating he had drafted a grievance proposal and a strike and lockout proposal for the Union's consideration.
>
> Hue stated that yesterday was addressed to the Union's concerns; today the Company wishes to discuss its concerns. Hue continued saying Tom Krysiak will present a report regarding the stable crew concept.

The "report" and discussion followed. The Company's notes also show:

> Grimmer [for the Union] stated the Union will go to the executive board for a blessing and, if approved, this type of system will be tried for a 1-week trial period. However, this does not include the running of 1 man short.
>
> Hue replied, this is a tremendous idea. The Company appreciates the Union's attempt to implement this system.

There was further discussion pertaining to the Company's manning proposal; the new classification; grievances; and vacation provisions. Tentative agreements were signed. See G.C. Exh. 62.

International representative Galbraith, in his report to the Union for these sessions (G.C. Exh. 58), after summarizing the "agreements reached", states:

* * *

> [The Company] still kept hitting on how poor shape they were competitively and the need for lower press manning. * * * We also got the poor mouth stuff on the 44-month contract—no wage increase—no cost-of-living—up work week to 38 hours and down the line. The customer business of wanting to know by March 21 if they were going to have a contract with us, or the customers would not be giving them work etc.

* * *

> Had a long discussion on the second day on press room seniority.

* * *

> I was hopeful that the [Union's concession on stable crew concept] would get [the Company] moving in other areas, but it was to no avail.

* * *

Galbraith concluded: "Look for a real tough negotiation, and a lot of game playing".

K. *March 9 and 10, 1977 sessions with Local 32B*

The sixth and seventh sessions between Local 32B and the Employer were on March 9 and 10, 1977. As the Company's notes for the March 9 session show (G.C. Exh. 48(f)),

> Hue stated that several items the Company and the Union discussed at the last meeting had been written into tentative proposals * * * superseniority, transfer between departments, the definition of a day, taking the taxicabs out of the emergency procedure, making up time following an industrial accident and a zipper clause.
>
> Hue stated that the Company would like to go through the gang operation proposal again in detail. Included in this discussion would be the manning adjustments as recommended by the Company. He continued that additional time needs to be spent on these items as they are very important to the Company.

Hue recalled that the "entire day" was devoted to these and related subjects. Hue agreed that we "made a fair amount of progress on those issues on that day."

On the next day, March 10, Company representative Hensler made an insurance presentation. See G.C. Exh. 48(g). An extended discussion ensued. Hue later returned to a discussion on bindery gang operations. The Company's bargaining notes show Hue stating: "The Company was not prepared to discuss anything other than ganging of the perfect binders and the manning of equipment"—"The Company in

today's meeting has already gone through those items which we wanted to discuss". However, the Company's bargaining notes for this session also reflect that during the remaining 30-60 minutes, the parties discussed, *inter alia,* the 38-hour work week; overtime; subcontracting; 44-month contract; and cost-of-living. Galbraith responded to the Company's 38-hour work week proposal by stating: "There was no proposal that would grind the Union more." Galbraith also commented: "if the Company was serious about getting a contract it was going about [it] the wrong way"—"the Company would never get a contract with what it had offered now"—"there would not be a contract with what the Company has on the table now * * *" (*Ibid.*) The Union's bargaining notes attribute to Galbraith the following statement: "* * * If this is the best contract, there will not be a contract signed. Fruitless to talk anymore today * * *". See G.C. Exh. 41, p. 46. Also see Galbraith's report to his International, R. Exh. 45, where he concludes:

> * * * I look for the same old tune if they do come up with a proposal—such as 44-month contract—no cost-of-living—no wage increase—increase hours to 38 per week—reduce manning, etc. * * *.

L. *March 14 and 15, 1977 sessions with Local 88L*

Local 88L and the Company held their seventh and eighth sessions on March 14 and 15, 1977. The Company's notes for March 14 (G.C. Exh. 49(g)) show the following exchange:

> Hue stated that the Company's objective is to have in the Union's hands by March 18 an acceptable proposal so that customers will continue to place work with [Banta]. The Union, however, appears to question the Company's seriousness as to getting a proposal to meet that date. Galbraith stated that he wishes to clarify his concern, for the Committee may or may not take the package back to the membership. It depends on its contents.

The parties discussed, *inter alia,* seniority; transfers; rate-retention; and cross-training. The Company proposed language on retraining and the Union accepted the language. The Union made a proposal "for a stable crew concept" and modified Company language "for reducing the work force" and "rate-retention." At the end of this session, Hue stated: "it appears we have made some progress in certain areas" (*Ibid.*)

On the next day, March 15, the parties discussed (see G.C. Exh. 49(h)), *inter alia,* stable crews; recall rights; rate-retention; vacations and vacation credits; operation of equipment; press wash up; use of supervisory help; subcontracting; chain shop clause; seniority; and reduced manning. At the conclusion of the session, agreement had been reached pertaining to, *inter alia,* performance of bargaining unit work by supervisors; temporary and probationary employees; layoff and discharge; subcontracting; vacations; wash up; temporary supervisors; and a Union shop clause. See, generally, G.C. Exh. 62, pp. 24-42, the tentative agreements reached by the parties.

However, as the Company's notes for the March 15 session also show (G.C. Exh. 49(h)), at the close of this session,

> *Miller stated it appears we are at an impasse. Let's call in a mediator.*
>
> *Hue replied, maybe we should.*
>
> Galbraith stated it appears the parties are in no mood to discuss anything further, however, would hope the parties could meet again on Friday. [Emphasis added.]

Further, Galbraith, in his testimony, acknowledged that "at the meeting on March 14 the Company once again proposed the deletion of the cost-of-living clause"; "Mr. Hue gave the same reasons as he had given at the previous sessions"; and on March 15 the Company "once again * * * touched on * * * the four major issues" and "there was no change" in position. In addition, Galbraith recalled stating at the March 15 session "a willingness to consider a 26-month contract". This proposed

contract term would still expire during the "busy season" and the Company "maintained their position on the 44-month contract" term. Galbraith reported on this session to his International (G.C. Exh. 59): "* * * the Company kept standing on their original proposal on hours, cost-of-living, term of contract and other areas even though we moved to give them flexibility * * *".

M. *March 16 and 17, 1977 sessions with Local 32B*

The Company's bargaining notes for the eighth and ninth sessions between Local 32B and the Employer (G.C. Exh. 48(h)) show:

> Hue stated [on March 16] that several items had been discussed last week on which tentative agreements had been reached * * * (1) a modified grievance procedure * * * (2) leave of absence * * * (3) a proposal defining acts of God * * * utilization of personnel * * *.

Hue also stated "the Company would leave the gang operation language the same in the contract" (*Ibid.*) The Union raised questions concerning some of the proposed tentative agreements. The parties also discussed, *inter alia,* rate-retention; permanent and temporary vacancies; grievances and flexibility. The parties finally agreed on leave of absence, acts of God and unit employee work (R. Exh. 21). Hue stated (G.C. Exh. 48(h)) that "the Company will be willing to drop its proposal concerning temporary help employees based on the agreement that will be reached on subcontracting * * *."

On the next day, March 17, the parties finalized agreements on subcontracting and permanent vacancy. See R. Exh. 22. The parties also discussed, *inter alia,* training periods; layoff; and insurance coverage. Schmeling later stated "that on Art. 5 concerning layoffs, the Union was in agreement with the tentative proposal by the Company."

Further, as the Company's notes for this March 17 session show (G.C. Exh. 48(i)):

* * *

> Schmeling responded that she had told the Company the Union would agree to the flexibility proposal if the Company dropped completely these 2 proposals concerning overtime and rate maintenance. Schmeling * * * asked if the Company's answer was no on these.
>
> Hue responded that his answer was what his answer was.
>
> *Schmeling responded that we are then at an impasse.*
>
> *Hue responded you said the word. He continued that the Company may as well write up its proposal which would include those items which the Company had agreed to plus those items left on the table.* Hue continued that he would have the proposal to the Union by Friday afternoon.
>
> Schmeling then stated that the meeting may as well be adjourned. [Emphasis added.]

Galbraith, in his report to the International for this session, states (R. Exh. 23):

* * *

> Company refused to move an inch although they still insisted they want a contract by the following Monday or they would be losing customers as they had become known as a strike happy Company. *Lee said we are at an impasse and asked what was the next step. Hue answered that he would write up a final proposal and give it to the Local. I suggested we might try a mediator and tried to smooth it over.* Local committee very upset at Company attitude. [Emphasis added.][21]

* * *

In addition, Galbraith's report to his International also shows

---

[21] Schmeling asserted in her testimony that she in effect had asked Hue on March 17 if this meant the parties were at impasse, and Hue replied no. On the entire record, I am persuaded here that the Company's notes, as substantiated by Galbraith's report to the International, are more reliable and accurate.

that on Friday, March 18, "both Locals received a final offer from the Company which included deletion of cost-of-living; 44-month contract; no wage increase; reduced manning; different formulas on [health and welfare]; and a number of areas of going backwards. We requested the Mediation Service to enter negotiations." Thereafter, on March 20, 1977, the Union voted to request a strike sanction from its International. The strike sanction was granted.

N. *March 28 and 29, 1977 sessions with Local 32B*

On March 28, 1977, Local 32B and the Company met for their tenth session. A federal mediator was present. See, generally, G.C. Exh. 48(j). The Union presented to the mediator a "revised proposal". The mediator, as the Company's notes show, restated the "revised proposal" to the Employer. The some 17 items in this proposal are summarized in G.C. Exh. 48(j). They include, *inter alia*, a 26-month contract expiring in June; no general wage increases; holding to the Union's proposal on the cost-of-living adjustment; and the same percentage of Company contribution to the health insurance program. Later, Hue apprised the mediator and Union representatives (*ibid*):

> that the Company was terribly disappointed with the laundry list the Union again came in today. It appeared as if negotiations had started today rather than it being the 10th meeting.

A discussion followed. The parties broke for lunch and later met privately with the mediator. The parties met again with the mediator separately on the following day, March 29, 1977. See G.C. Exh. 48(k).

O. *March 31, 1977 session with Local 88L*

On March 31, 1977, Local 88L like Local 32B, met with the mediator and presented to him a "revised proposal." See, generally, G.C. Exh. 49(i). The parties later met. The Union extensively reviewed the "proposal and the items agreed to up to this date" (*Ibid.*) The Company's notes show that the Union

indicated, *inter alia*, that it would increase the contract term to 26 months. Later, the parties met again. The Company, like the Union, presented revised proposals. A discussion followed pertaining to, *inter alia*, the stable crew concept. Following a lunch break, the Union "reviewed some of the Company's requests." Further discussion ensued. Union representative Galbraith, in reporting to the International on the progress of this session, stated (G.C. Exh. 60):

* * *

> We have given the Company through the mediator a new proposal dropping many of our demands but still leaving 17 issues on the table. Many of these were still on the table because of the Company's proposal to increase hours, delete cost-of-living, 44-month contract with no wage increase, and all the others.
>
> I had been in touch with Bill Schroeder throughout and we did not want to strike but wait for him to get into negotiations, so I had mediator set up meeting * * * even though Miller and his Committee are getting hotter than hell at the Company for lack of movement.

* * *

See, generally, G.C. Exh. 49(i).

P. *April 1, 1977 session with Local 32B*

Local 32B met with the Employer for their twelfth session. The mediator was present. The Union again modified its proposals. See, generally, G.C. Exh. 48(l), summarizing the Union's position. Local 32B proposed, *inter alia*, a 26-month contract expiring in June; retention of the present health and welfare formula; the Union's cost-of-living proposal; and no general wage increase. The Union reviewed in detail the Company's proposals. As the Company's notes show, "Hue stated that that would have been nice movement on the Union's part if this were February 15, 1977. Hue continued that it appeared that the Company's proposal was completely rejected and the Union had not addressed itself to the critical problems here * * *" (*Ibid.*) More discussion followed. Schmeling

"stated that the Union has moved from their initial proposals and expected some counter-action from the Company. Hue responded that that type of movement back in February would have been worthy of note * * *" (*Ibid.*)

Later that same day, as the Company notes also show (G.C. Exh. 48(l)),

> Galbraith stated that the Union Committee had searched for a way to break the log jam on the proposed 38-hour work week of the Company. He continued that the item of working breaks was not officially on the table, however, he did not think the Company thought it through seriously enough as they had responded too quickly to it.
>
> * * *
>
> Hue responded that the Company had given this item very serious thought as the Company had the situation of working through the breaks prior to the 1971 contract.
>
> * * *

Galbraith, as the Company's notes further reflect, "asked if the Company was again prepared to meet on Monday," April 4. Hue "responded that the Company has a problem with that unless the Company and Union could agree to some terms under which * * * they would work".[22] Galbraith replied "that he hoped that the Union could operate under the old contract, however, realizing that the cost-of-living was not to be put into effect". Hue "responded that a few other things bothered the Company and that some understanding should be reached and documents signed accordingly". In reply, Galbraith noted that he "did not have the authority to sign any type of extension document". Hue replied that "the Company could only continue if it had these assurances", whereupon Galbraith stated: "the Union was willing to negotiate until it had an agreement with the Company." Hue observed "that it was his

[22] The existing contract, as noted, would expire on April 3, 1977.

understanding that when you reach the expiration of the old contract and you have nothing agreed to, that's an impasse * * *". Hue then prepared a proposed interim agreement which Galbraith agreed to take back to the membership. Hue explained:

> he [Hue] would like to take 5 minutes to write up a proposal for the Union so that the Company and the Union could continue to operate and work

Galbraith asserted: "in the past the Union continued to work". The proposed interim agreement provides (G.C. Exh. 43):

* * *

> [The parties] will continue negotiations to renew the agreement * * *. Normal operations will be maintained while negotiations continue under the following conditions:
>
> 1. There will be no change in the wage rates and there will be no additional cost-of-living payment.
> 2. Health insurance dollar contributions by the Company will remain unchanged.
> 3. Temporary vacancies will be administered as already agreed by the parties * * *.
> 4. Other matters during this time will be handled in accordance with the agreement expiring on April 3, 1977.
>
> * * *
>
> This agreement will remain in effect to and including May 1, 1977, unless terminated by either party giving the other 24 hours written notice.[23]

---

[23] As discussed below, Union representative Schmeling read the above proposed interim agreement to the membership on Sunday April 3 "and the members just laughed * * *; the members did not want to come back in unless it's under the old contract". Union representative Spielbauer explained that "the members were interested in getting" the cost-of-living adjustment "due under the old contract and the Committee had to tell the membership that the Company had replied no to that * * *". See G.C. Exh. 48(m).

Q. *April 2, 1977 session with Local 88L*

This was the tenth meeting between these parties. The mediator was present. As the Company's bargaining notes show (G.C. Exh. 49(j)), Galbraith "stated that the Union wishes further discussion on preparatory department flexibility and the handling of stable crews. Hue stated the Company is willing to address itself to stable crews, but if the flexibility of the prep. dept. is too big to hang-up, the Company is willing to forget about this area". T. Krysiak, a Company representative, stated: "The Company has discussed the Union's proposal on stable crews and although we are not in total agreement with the Union, the Company does recognize the need for stable crews". Further discussion ensued. As the notes show, the "parties agreed to the stable crew concept" (*Ibid.*) The parties moved to the flexibility proposal. Later, the Union made a new proposal on this subject. Further discussion ensued. Subsequently, Galbraith "stated that the Union will agree to the Company proposal regarding the 6-point flexibility program", and Hue replied: "okay" (*Ibid.*)

The parties turned to the "economic proposal". There was discussion pertaining to the work-week; insurance program; contract expiration date; cost-of-living; and manning. The Company's notes show (*ibid*):

> Hue stated the Company is gratified regarding the accomplishments of the day and feels the Union has been negotiating seriously at the crux of the problem for this round of negotiations. Hue continued saying that if some agreement can be reached in manning in the sheet-fed and webs, this could be a day of major accomplishments.

Further discussion ensued.

The Company presented a proposal "regarding the tenders in both web-press and sheet-fed areas". The parties continued their discussions. Later, Union negotiator Miller commented: "is there something else we can talk about besides this item". Hue replied:

> The Company could give a proposal if it had an agreement to these items, however, without agreement this is not possible, because when something is placed on the table and tentatively agreed to, it's there.

The parties took a recess. Later, further discussion followed. Hue "stated the Company has put together a proposal along the lines of the previous discussions" pertaining to sheet-fed and web press room. There was further discussion.

The Company's notes also show Galbraith stating that the "Union will take a look at the Company's manning proposal during the next caucus". Then, as the notes reflect, the Union presented a "modified" economic proposal to the Employer, in part as follows:

1. A 27-month contract. Galbraith stated: "this is as far as the Union can go".
2. Cost-of-living "as is".
3. 35-hour work-week.
4. Health and welfare "as is".
5. "Remove lid from pension plan".
6. Remove "chain shop" clause.

Following a caucus, Hue announced that "The Company will modify its proposal on economics", in part as follows (*ibid*):

1. It would drop its $200 maximum for sick benefits.
2. It wanted a 38-hour week with a short Friday.
3. It would grant a cost-of-living adjustment allowance "effective the first payday in July 1978 * * *. The * * * formula would be a 2 cents a point to those [in the lower] classification and 3 cents a point to all others.
4. There would be no change in the Company's proposed term of contract.

5. It would grant a limited flat increase in its contribution under the health insurance plan.

The Company's notes show Galbraith responding to the above proposal, as follows:

> The Union has made a hell of a lot of movement for what the Company has given in return. In our estimation, you have shit a brick.

The mediator later apprised the Employer, after conferring with the Union, that "the Union was not planning any economic action prior to Tuesday's meeting", April 5, 1977 (*Ibid.*) Union representative Galbraith, in his report to the International for this session (G.C. Exh. 60), states:

> At this meeting, we cut the proposal to the bare bones only asking for a minimal pension increase and also agreed to reduced manning, more flexibility in the prep. debt. In return, we got the same old story, with the cost-of-living now in the table at a reduced level starting in July 1978, the 44-month contract, with no wage increase.
>
> Miller was madder than ever and called Committee meeting for the following morning to call a holiday on Monday, the first day the contract expired * * *.

R. *April 3, 1977 session with Local 32B*

This was the thirteenth session between these parties. The mediator was present. The Company's bargaining notes (G.C. Exh. 48(m)) show the following exchange:

* * *

> Galbraith stated that the Union was here to bargain today.
>
> Hue responded that that is not what the Company has been told through the mediator.
>
> Meyer [the mediator] asked if the plant would be shut down Monday or not.
>
> Galbraith responded, yes, it was going to be a holiday.[24]

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[24] The notes show Schmeling stating during the above discussion "that Local 32B would be calling an executive session * * * it could not take a vote during the Sunday meeting * * *".

* * *

The notes also reflect Schmeling stating:

> The Union has been giving for the last 2 weeks and has received nothing in return. * * * She had Talked with Bob Miller in the morning, and the Union had gone through everything the Company had agreed to with Miller, and if the Company were to respond the same way to the bookbinders, it would not be sufficient.

In addition, Schmeling "stated that she had read the extension which the Company had proposed at the meeting today and the members just laughed. She continued that the members do not want "to come back in unless it's under the old contract * * *".

The parties, however, continued negotiations. The parties discussed, *inter alia,* manning; health and welfare; length of contract; hours of work; and cost-of-living. Later, Schmeling "stated that the Union had expected a counter-proposal from the Company and the Company has not done this. Hue responded that if anything hits the table, the Company has to know which direction these negotiations are going * * *" (*Ibid.*) Further discussion ensued. Subsequently, following a caucus, the Union agreed to modify its position, in part as follows:

1. Elimination of doubletime after 2 hours.
2. Limitation on overtime rate.
3. Vacation year April to April.
4. Reduced manning.
5. A 27-month contract.

The notes also show Schmeling stating: "The Union would agree with a July 1, 1979 expiration date with the understanding that the present contribution for health and welfare would remain the same * * *; the cost-of-living adjustment

* * * would need to stay * * *; 35-hour work week was going to have to be there * * * (*Ibid.*) Further discussion ensued concerning, *inter alia,* manning. The notes record Hue as stating:

> The Company was prepared to modify its proposal if the Company and the Union could reach agreement on any of these outstanding issues. Hue continued that this, of course, would be with the understanding that . . . the Union was not being committed to anything by going through these discussions.

The Union caucused again and modified its position on manning issues.

Thereafter, the Company caucused and, upon its return, Hue stated:

> when the Company and the Union first sat down the Company did not feel it could put a nickel into its proposals. * * * The Company now has some significant response from the Union, therefore, there was some money to be put on the table. He stated this was the best the Company could do.

The Company proposed, *inter alia:*

1. Dropping its proposal to eliminate rate-retention.
2. Increased pension payments.
3. A limited flat increase in the health insurance contribution by the Employer.
4. Eliminating the maximum sick benefit payment.
5. A 38-hour week with a short Friday.
6. A limited cost-of-living increase commencing July 1978 for certain classifications.
7. A contract expiring in December 1980.

Schmeling caucused with the Union representatives. Mediator Meyer returned and announced "that the Union needed everything they had asked for * * *; the cost-of-living

formula they had * * *; the present health and welfare formula; and the pension they had proposed". Thereupon, the Company representatives apprised the Union representatives "that the Company's proposal for contract modification would be put into effect starting tomorrow" *(Ibid.)*

On the next day, Sunday April 3, Local 32B negotiator Schmeling apprised Management at the Local's thirteenth session that "the Union had gone through everything the Company had agreed to with [Local 88L] Miller, and if the Company were to respond the same way to the bookbinders, it would not be sufficient". She stated that the membership had "just laughed" at the Employer's proposed interim extension—"they did not want to come back in unless it's under the old contract * * *". Local 32B, like 88L, further "modified" its proposals. The Employer then proposed, *inter alia,*

1. a limited flat increase in its health insurance contribution;
2. a 38-hour work week with a short Friday;
3. a limited cost-of-living increase commencing in July 1978; and
4. a 44-month contract.

The mediator was instructed by the Union to apprise Management "that the Union needed everything they had asked for * * *; the cost-of-living formula they had * * *; the present health and welfare formula; and the pension they had proposed". The Employer then announced that its proposal for contract modification would be put into effect.

On this record, I find and conclude that the parties had bargained to impasse by April 4 and had exhausted the prospects of reaching an agreement. The parties, although reaching tentative agreements on many issues during their 23 collective bargaining sessions from February 2 to April 4, remained far apart on critical and major items. Counsel for

General Counsel and Charging Parties note the significant movement of the parties during these last few sessions, emphasizing, *inter alia,* Management's proposal to modify its earlier position on health insurance contributions and cost-of-living increases. However, as the record shows, Management's proposed modifications on these critical items were limited and for the most part represented an economic step backwards for the Unions. Thus, Galbraith responded to Management: "In our estimation, you have just shit a brick". Schmeling also apprised Management through the mediator that "the Union needed everything they had asked for * * *". The Union had declared Monday April 4 to be a "holiday". The plants were closed down. Later that day, the Unions voted to strike.

Discussion

General Counsel and Charging Parties argue that Respondent Employer violated Section 8(a)(5) and (1) of the Act by announcing implementation of and by implementing its last contract offer at a time when negotiations were continuing and bargaining impasse had not occurred. Respondent argues that the parties were at impasse by April 4, 1977 and, consequently, the Employer's implementation of principles were restated and applied by the Board in *Taft Broadcasting Co.,* 163 NLRB 475 (1967), enforced 395 F. 2d 622 (C.A.D.C., 1968), as follows:

* * *

> An employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.
>
> Applying the foregoing standards to the instant case, we believe that the parties here reached an impasse in negotiations. * * * [T]here is no evidence that the Respondent engaged in bad-faith bargaining. The Respondent wanted certain changes in working conditions which would give it greater flexibility in the assignment of its personnel. As viewed by the Union, this meant serious loss to its members. Both parties took strong positions. Both parties bargained in good faith with a sincere desire to reach agreement. However, after more than 23 bargaining sessions, progress was imperceptible on the critical issues and each believed that, as to some of those issues, they were further apart than when they had begun negotiations. Viewed in this light and from the vantage point of the parties on December 4, when the Respondent announced the changes here involved, we are unable to conclude that a continuation of bargaining sessions would have culminated in a bargaining agreement. Of course it is true that, by December 4, other issues had been resolved by the parties. But, in this respect, an impasse is no less an impasse because the parties were closer to agreement than previously, and a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions. [Footnotes omitted.]

Upon the credible evidence of record in the instant proceeding, as detailed above, I find and conclude that an impasse in contract negotiations had occurred by April 4, 1977, when the Employer announced the implementation of its last contract offer.

The two Locals and the Employer engaged in collectively some 23 bargaining sessions from February 2 to April 4, 1977.

There is no contention made here that Respondent Company bargained in bad faith with the Unions during these 23 sessions. At its initial sessions with both Locals during February 2 and 8, the Employer presented its proposed modifications to the existing agreements. The Employer proposed *inter alia*, a 44-month contract expiring in December 1980 instead of the 24 or 36-month agreement expiring during its busy season. The Employer also proposed to enlarge the existing work week from 35 to 38 hours; a cut-off in the Company's contribution to health insurance costs; and no wage increases or cost-of-living payments during the term of the agreement. As counsel for the Unions notes in his post-hearing brief (p. 120), the "Company presented each Local Union with a contract proposal which eviscerated every gain that the Unions had obtained over the past decade * * *". Union representative Schmeling commented: "If the company maintains its position as indicated today, the Company may well notify the customers of an oncoming strike, as her members would never accept a proposal as discussed today."[25]

The two Locals and Employer, by their third bargaining sessions, had reached a number of tentative agreements. However, the record makes clear that with respect to the so-called major or critical issues, there was no movement. Thus, as Union representative Schmeling stated at Local 32B's third session, "there was very little movement on the part of the Company"; the Union "is wasting its time talking to the Company"; "perhaps the Union should cancel the meeting next week"; the Company "proposal was ridiculous"; "there were a lot of areas which the Union would not move on"; and "the Union was willing to bargain but it was not going to accept a 44-month contract" and a contract "that didn't have the cost-of-living increase." Union representative Spielbauer also ob-

[25] At Local 32B's second session with the Employer, Schmeling similarly commented: "if the Company feels their proposal is going to be bought as it is written, they were going to be in for a surprise".

served: "* * * most of the tentative agreements signed today really meant nothing * * *".

International representative Galbraith entered the bargaining arena during the fourth session with Local 88L. Galbraith later attended the sessions for both Locals. Galbraith generally acknowledged that the so-called major or critical items—the 44-month term of contract, the 38-hour work week, freezing the Employer's payment of health insurance costs and no wage increase or cost-of-living payment—were discussed at the sessions which he had attended. And, Company representative Hue similarly recalled that these major items had been advanced at the earlier sessions and after Galbraith had joined the bargaining process. The parties, However, adhered to their positions on these critical issues.

Union representative Schmeling made clear at Local 32B's fifth session that "her members won't go backwards * * * they would rather go on welfare then take the proposal the Company has offered." And, International representative Galbraith wrote: "At first I could hardly believe they were sincere in their position but it looks more and more like they want to let the work out and have massive layoffs in order to get the type of contract they desire * * *." Further, Galbraith, in his report to the International pertaining to Local 88L's fifth and sixth sessions, wrote:

* * *

> [The Company] still kept hitting on how poor shape they were competitively and the need for lower press manning. * * * We also got the poor mouth stuff of the 44-month contract—no wage increase—no cost-of-living—up work week to 38 hours * * *.

Galbraith noted: "I was hopeful that" the Union's concession on the stable crew concept "would get [the Company] moving in other areas but it was to no avail." Galbraith concluded: "Look for real tough negotiations and a lot of game playing."

Later, at the sixth and seventh sessions involving Local 32B, Galbraith commented: "* * * The Company would never get a contract with what it had offered now"—"if this is the best contract there will not be a contract" and it was "fruitless to talk any more today." Galbraith informed his International: "* * * I look for the same old tune if they do come up with a proposal—such as a 44-month contract, no cost-of-living, no wage increase, increase in hours to 38 per week, reduce manning, etc. * * *."

It is true, as counsel for the General Counsel and the Unions argue in their briefs, the parties were modifying and changing their positions during these sessions and a number of tentative agreements had been reached. See, for example, G.C. Exh. 62. However, it is also true that of the some 30 or more proposals initially advanced by each party, the agreements which were reached by-and-large pertain to relatively less significant and less critical areas of negotiation. Consequently, Local 88L negotiator Miller declared at the eighth session on March 15, "* * * it appears we are at an impasse. Let's call in a mediator." Management agreed. Galbraith later reported to his International: "* * * the Company kept standing on their original proposal on hours, cost-of-living, term of contract and other areas even though we moved to give them flexibility * * *". And, at the ninth session with Local 32B on March 17, Schmeling similarly declared "that we are then at an impasse". Hue, in turn, agreed to "write up a final proposal and give it to the Local". Galbraith, in his report to the International, noted that on Friday March 18, 1977, "both Locals received a final offer from the Company which included deletion of cost-of-living; a 44-month contract; no wage increase; reduced manning; different formulas on health and welfare; and a number of areas going backwards * * *". A few days later, the Union voted to request a strike sanction from the International and the request was granted.

A mediator attended the bargaining sessions from March 28 to April 4. On March 28, Local 32B presented a "revised proposal". Company negotiator Hue, in response, stated that he was "terribly disappointed". There was no significant movement in any of the critical areas. On March 31, Local 88L similarly presented a "revised proposal." Galbraith, in his report to his International, noted: "We have given the Company through the mediator a new proposal dropping many of our demands, but still leaving 17 issues on the table. Many of these were still on the table because of the Company's proposal to increase hours, delete cost-of-living, 44-month contract with no wage increase, and all the others * * *".

Thereafter, on April 1, Local 32B met with the Employer for their twelfth session. Local 32B again modified its proposals. However, Company negotiator Hue commented that "the Union had not addressed itself to the critical problems here * * *". Galbraith asked "if the Company were again prepared to meet on Monday", April 4. Hue "responded that the Company has a problem with that unless the Company and the Union could agree to some terms under which * * * they could work". As noted, the existing contract would expire on Sunday April 3. Hue proposed an interim extension agreement for 30 days unless terminated by either party on 24-hours notice. The proposed extension agreement provided, *inter alia,* that the negotiations would continue; normal operations would be maintained; there would be no change in wage rates or cost-of-living payment; health insurance contributions would remain unchanged; temporary vacancies would be administered as already agreed by the parties; and other matters would be handled in accordance with the prior agreement. The Union stated that it would take this proposed interim agreement to its membership. As noted below, Union negotiator Schmeling told Company negotiator Hue two days later, on April 3, that the "members just laughed" at this proposal—"the members didn't want to come back in unless it's under the old contract * * *".

Local 88L met with the Employer for its tenth meeting on April 2. The parties made significant progress at this session on, *inter alia,* reduced manning and flexibility. Indeed, Hue "stated that the Company is gratified regarding the accomplishments of the day * * *". Local 88L presented a "modified" economic proposal to the Employer, including:

1. a 27-month contract—"this is as far as the Union can go";
2. cost-of-living "as is";
3. 35-hour work week; and
4. health and welfare "as is".

The Company later agreed to modify its proposal on economics, granting, *inter alia,*

1. a 38-hour work week with a short Friday;
2. a limited cost-of-living allowance effective in July 1978;
3. a 44-month contract; and
4. a limited flat increase to its health insurance payment.

Galbraith responded:

> The Union has made a hell of a lot of movement for what the Company has given in return. In our estimation, you have shit a brick.

As Galbraith wrote to his International:

> At this meeting, we cut the proposal to the bare bones only asking for a minimal pension increase and also agreed to reduced manning, more flexibility in the prep. dept. In return, we got the same old story, with the cost-of-living now on the table at a reduced level starting in July 1978, the 44-month contract, with no wage increase.

In sum, I find and conclude on this record that there was an impasse by April 4, 1977. For, as the Board stated in *Taft*

Broadcasting, supra, "an impasse is no less an impasse because the parties were closer to agreement than previously, and a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions". General Counsel has therefore failed to establish here that the Employer violated Section 8(a)(5) and (1) of the Act as alleged and, consequently, that the ensuing six-month strike was an unfair labor practice strike. Although I make this determination based upon the evidentiary presentation made here "for background purposes", I note that this issue is by no means free from doubt. Indeed, the parties reasonably, in my view, agreed upon a settlement in *Banta I* to avoid a resolution of these difficult questions. The settlement and order in *Banta I,* as recently enforced by the Court of Appeals, are binding upon the parties here. The settlement obligation, as the Court notes, "includes a statement of the striking employees reinstatement rights which coincide precisely with those of unfair labor practice strikers". The Employer was also required to "revoke its last contract offer" and to "revert to the wages, hours of work and other terms and conditions of employment which existed prior thereto, but excluding cost-of-living adjustments, arbitration procedures and union security." The sequence of events recited below will, of course, be assessed in the context of this outstanding obligation.[26]

II. The Employer's Reinstatement Of The Strikers

The strike by the two Locals commenced on April 4 and continued until October 8, 1977. The parties continued to meet during the strike.[27] No permanent replacements were hired by

[26] At the hearing, I denied counsel for Respondent's motion to dismiss the above allegations for Section 10(b) and related reasons. Upon reconsideration, I adhere to that ruling. See transcript, pp. 59-63, 71-73.

[27] A review of the bargaining notes and related testimony

(Footnote continued on following page)

the Company during the strike. However, at the April 21 bargaining session (see R. Exh. 47(b)), Company representative Hue, while discussing the subject of "rate maintenance", stated:

> * * * if the Company would try to start up today it would be with a relatively small number of people due to the work that has already been lost * * *. The Company would have to sit down and talk with the Union concerning what rate these individuals would come back to work at. [Hue] continued that even if the strike ended today he would be surprised if over half the individuals would be immediately recalled. If only half the people would come back, the rate would be too high to be at all competitive * * *.

Later, on July 22, 1977, the Company executed the settlement agreement in *Banta I, supra,* containing a statement of the striking employees' rights which coincide with those of unfair labor practice strikers. The Union, at the time, objected to the settlement in certain respects.

Thereafter, on September 9, 1977, the Employer apprised the striking employees that it had been "unable to resolve the strike now in its 23rd week"; "the parties are at an impasse"; "no further meetings are scheduled because of the deadlock"; and the Company "will continue to expand its production capabilities by whatever means are necessary including the hiring of new employees * * *". See R. Exh. 65. The first striker resigned from the Unions and abandoned the strike on or about September 13, 1977. From about September 13 to October 3, 1977, some 70 strikers similarly resigned from the Unions and abandoned the strike. As Union representative Schmeling testified: "* * * there was a back-to-work movement.

(Footnote continued from preceding page)

pertaining to the meetings during this period shows nothing inconsistent with the finding of impasse and deadlock by April 4, as discussed in Section I, *supra.* The parties remained deadlocked and at impasse during this period. See R. Exh. 47.

We were told that there were approximately 100 of our members [who] were going to cross the picket line and go in * * *". The parties again returned to the bargaining table on October 4, 1977.

At the October 4 session, the Employer's counsel distributed to the Unions for the first time copies of his proposed "preferential reinstatement system" and "explanation". See G.C. Exhs. 10 and 11. This proposed "preferential reinstatement system" provides, *inter alia*, for (1) the reinstatement of striking employees to "the same or substantially equivalent employment" and (2) for those striking employees who are "not offered substantially equivalent employment". Under the first group, a striking employee making an unconditional offer for reinstatement "who has not engaged in misconduct sufficient to warrant discharge" will be "reinstated in the job classification he held when the strike began * * *"— "if there is no vacancy in that classification the employee will be reinstated in any substantially equivalent job classification for which he is qualified and in which a vacancy exists". Under the second group, a striking employee "who cannot be offered immediate reinstatement" as provided above, "will be offered reinstatement in any job classification in which a vacancy exists provided the employee is qualified * * *"; the employee "shall be placed on a preferential hiring list for all future vacancies constituting the same or substantially equivalent employment in chronological order of [his] unconditional offer of reinstatement." The document also provides: "an employee reinstated pursuant to this preferential reinstatement system shall be paid the rate of the classification to which he is reinstated."

The Employer's proposed "preferential reinstatement system" was to remain in effect until October 1980. It's claimed purpose was, *inter alia*, to place strikers "back into jobs and departments in which they are familiar", "avoiding retraining" and "continual reshuffling." And, as the Employer asserts in its post-hearing brief (pp. 105-107), "utilization of the contractual

provisions relating to layoff and recall was considered unworkable * * *" by Management.

The Company's bargaining notes for this October 4 meeting show the following exchange (R. Exh. 47(s)):

> [Union representative] Schmeling's reply to the proposal was that she didn't like it and she wanted to stick those who had resigned and crossed the picket line.
>
> [Company representative] Hue replied that he was aware of this, that the employees who had come back to work had told him they were scared to death of revenge from the Union and that they were begging the Company not to let them down by allowing the Union to take illegal retribution on them.

Further, Leo O'Connor, chief spokesman for Local 88L at this meeting, testified on cross-examination, as follows:

* * *

Q. Do you recall me [counsel for Respondent] stating on behalf of the Company that one of the reasons we were proposing the preferential reinstatement system is we wanted to avoid bumping within the plant when operations started up again?

A. Well, the way I recall it, you didn't want to bump the people that were in there already.

Q. Do you recall me saying also that when people got in and when operations began to phase up, we didn't want people bumping into various jobs?

A. You didn't want any of the strikers to move ahead of the people that were in there. That's what you said.

Q. Okay. I said—Let's examine that. I said that under the preferential reinstatement system, cross-overs, as they've been referred to in this proceeding, who were already reinstated, would not be bumped out, is that correct?

A. Right.

Q. Okay. Do you recall me saying that with respect to future job openings, as we began operations on a larger basis, that the cross-overs would not have any preference for future job openings, and that we'd be calling people in from off the street to take those jobs?

A. As long as they stayed in their seniority or the job they had when they returned from the strike, yeah.

* * *

There was further discussion and the meeting adjourned.[28]

The Unions and the Employer met again on October 5, 1977. See R. Exh. 47(t). The Company's contract proposals, presented at the previous meeting, were discussed. The parties also discussed the proposed "preferential reinstatement system." The Unions wanted to invoke the contractual recall provisions which were predicated upon employee seniority. A discussion followed. The Company's bargaining notes (R. Exh. 47(t)) show, *inter alia,*

* * *

> Discussions took place regarding the actual mechanics of employees in the bookbinder unit moving from one job to another and how this would be accomplished. In reinstating people, Galbraith suggested that classification seniority be used for reinstatement in the prep. dept., that unit seniority be used on the webs for web people and on the sheet-feds for sheet people.

* * *

Schmeling stated that "on reinstatement of bookbinder people, the bookbinders wanted to use straight unit seniority across the board with the exception of people who would not be qualified

[28] At this meeting, the Employer also presented certain revised contract proposals for the Unions' consideration. See R. Exh. 47(s).

on the job" and the "Union would be reasonable in recognizing lack of qualification * * * ". Further, "the Union wanted full rate-retention [as provided in the prior contract], with no reduction in pre-strike rates * * * full recall rights for all employees" (*Ibid.*)

The parties met again on October 6, 1977. See R. Exh. 47(u). As the Company's notes show (*ibid*), "Hue discussed the preferential reinstatement system by stating that, [as] for Local 88L, the Company would be willing to accept classification seniority for reinstatement to prep. dept. journeyman, and unit seniority to general worker. On the presses, both web and sheet-fed sides, unit seniority would be used to reinstate pressmen and unit seniority by classification for the rest of the employees * * * . " Union representatives O'Connor and Grimmer had "stated they would like unit seniority to reinstate all in the' pressrooms, except that people in the classification of one-color pressman and below would be used for jogger vacancies, but that no one above one-color pressman would be used for such vacancies." Hue replied: "The Company would consider this proposal."

Further, as the notes show, "in regard to reinstatement of Local 32B employees, the Company felt that to reinstate within each classification by unit seniority was the best [it] could do. To reinstate across the board on unit seniority would become a very real problem because of endless arguments regarding qualifications * * * ." And,

> Schmeling responded that the Union wanted unit seniority, there would be no problem because of the way people were distributed, and that if problems came up the Union would be willing to work them out with the Company.

Following a caucus, "Hue stated that the Company will be willing to modify pressroom reinstatement on the basis that unit seniority would be used to reinstate employees on both the web-fed and sheet-fed sides except that four-color pressmen would not be entitled to be reinstated to the jogger position."

The bargaining notes show that during this session the Unions "still insisted * * * that, upon ending of the strike, *all employees be reinstated according to their seniority order including those who had resigned and were already working* * * * " (*Ibid,* emphasis added.) In addition, the Company indicated that it "had an absolute final [contract] proposal to make to the Unions". The Employer thereafter made "its absolute last and final" offer. See R. Exh. 47(u). The proposed contract, like the "preferential reinstatement system", would expire in October 1980. The bargaining notes further show (*ibid*):

> Schmeling responded that this proposal was unacceptable and that the Unions were tremendously disappointed and would never give in to the Company * * *.

Management "left" the meeting.[29]

Company representative Hue, while being questioned on cross-examination about the Employer's proposed "preferential reinstatement system", with reference to the bookbinders, testified in part, as follows:

* * *

Q. Now, there's no saving in cost in putting a qualified striker into a position as opposed to a qualified crossover, is there?

A. No.

Q. There's no saving in training in putting a qualified striker in a position as opposed to a qualified crossover, is there?

A. No.

Q. And after initial reinstatement, there is no increased shuffling in using straight seniority as opposed to preference to crossover, is there?

A. As opposed to preference—

---

[29] The "preferential reinstatement system", as later modified by Hue, is set forth in G.C. Exh. 21 and 22.

Q. To crossovers?

A. To crossovers?

A. In other words, if you'd put the people into their position in accordance with straight unit seniority, as opposed to putting crossovers in their positions and then using unit seniority for the strikers, would there have been any increase in the amount of shuffling around of them in the plant after the initial reinstatement? There would be none?

A. I have no way of knowing that. I don't know.

Q. Well, is the PRS [the preferential reinstatement system], in your opinion, ever going to end?

A. By its own terms. It has an ending date on it.

Q. When does it end?

A. October,—whatever. Whenever the whole contract ends.

Q. And that's when the PRS ends?

A. That's what it says.

Q. And is it your testimony that when the PRS ends, then everybody will go back to their rightful positions by strick seniority—unit seniority?

A. Whatever we negotiate in the new contract is what will determine. I don't know.

* * *

The parties met again on October 7, 1977. The Union representatives asked questions which Hue answered. See R. Exh. 47(v). Galbraith "asked if all strikers would be reinstated" and Hue "responded that, in accordance with out previous agreement, they would be reinstated * * *". Union representative O'Connor "asked how many employees would be reinstated" and Hue responded "100 to 150 with a gradual build-up. This was just a guess * * *" (*Ibid.*)

On October 8, 1977, the memberships of Local 88L and 32B met separately to vote on the Employer's "preferential

reinstatement system" and final contract proposals. The members voted to authorize the Union to make an unconditional offer on their behalf to return to work; they voted to accept the contract proposals; and they disagreed with their legal rights of reinstatement as contained in the "preferential reinstatement system". The Unions also signed the Board settlement agreement in *Banta I, supra.* See G.C. Exh. 12. The Unions, in apprising the Employer of their determination, stated: "We will rely on the statutory rights of reinstatement as provided by the Statute and the settlement stipulation described above and of course do not waive any of those rights" (*Ibid.*)

On or about October 8 or 9, 1977, Hue notified the Unions that the reinstatement system was an integral part of its offer and, therefore, there was no contract. See G.C. Exh. 13. On October 10, the Unions indicated that they had accepted the "total offer". The Unions, however, also made clear that they were not waiving "the right to present to the NLRB any questions as to the legal reinstatement rights of the strikers which may not be effectuated by your proposed preferential reinstatement system * * *". See G.C. Exh. 14. The Employer's counsel later acknowledged to Union representative O'Connor: "I understand that we have a contract now but you are reserving the right to claim the PRS is illegal." O'Connor agreed. Also see G.C. Exh. 15. Thereafter, on November 8, 1977, Schmeling wrote Hue (G.C. Exh. 45):

* * *

> It is our position that all striking employees are entitled to reinstatement to their former positions or substantially equivalent positions in accordance with their rights under the [Act] and pursuant to the terms of the settlement stipulation which you signed on July 22, 1977. In the event that there are not enough jobs available for all strikers, they are entitled to be called back to work to lower paying

jobs strictly in order of their seniority list which existed prior to the strike, without reference to any individual who may have crossed the picket line during the strike and returned to work.

* * *

The record shows that historically the collective bargaining agreements between the parties have provided for the recall of laid off employees by seniority. The record also shows that seniority was utilized by the parties in the past as a basis for recalling employees from strikes. Management considered these contractual provisions "unworkable" here. Union representative Grimmer recalled that "we had a layoff prior to the strike and they rehired these people in 1974 right after the strike; they called back by seniority". Union steward Holcomb similarly recalled that "people in the past strikes" were "called back to work in the prep. dept." by "seniority". And, Company representative Hue agreed that, "in calling people back in to the prep. dept. in 1974 * * *", they were "called back in seniority order". Union representative Grimmer further testified that at the end of the 1974 strike "not everybody was immediately reinstated"; workers in the "prep-end and the press-end" were not reinstated "until the production warranted". Union steward Holcomb likewise recalled a "delay" in recalling striking preparatory department workers in the past. They were ultimately recalled by "seniority". Further, Company representative Hue testified in pertinent part, as follows:

* * *

Q. Now, in 1974, you had the problem of people reinstated to the wrong job after the strike because of a slowdown in work, only on a much lower scale, is that correct?

A. That's correct.

Q. Those people you couldn't reinstate—And you reinstated people to their old jobs according to seniority, is that correct?

A. Yes.

Q. And did the Union ever contest that that was anything other than what they felt the contract required?

A. No. They agreed with it. They said, that's the way to do it.

Q. Okay. And there were a couple of people you couldn't reinstate to their old job in 1974 because of a temporary decline in work. And you reinstated them to other jobs in other departments even, was that correct?

A. Yes. The people from the preparatory department.

Q. Okay. And you didn't honor their rate-retention under the contract, did you?

A. No.

Q. And did the Union file any grievances on that?

A. I don't remember any grievances.[30]

* * *

The Employer, as stated, did not utilize contractual lay off provisions or past practice in recalling the 1977 striking workers. Instead, the Employer utilized its "preferential reinstate-

[30] The record shows that the collective bargaining agreements between the parties have contained and presently contain so-called "rate-retention" provisions. Employees, under these provisions, retain under certain circumstances their normal wage rates when assigned to lower-rated positions. Cf. G.C. Exh. 5, pp. 8-10, and G.C. Exh. 6, p. 17. The Company, in its post-hearing brief (p. 122), explains that "an employee temporarily or permanently assigned to a lower-rated classification than his regular permanent classification is nonetheless entitled to retain the rate of pay of his regular permanent classification * * *". The Company adds that an employee "retaining a higher-rated rate notwithstanding permanent assignment to a lower-rated classification is a displaced person * * *" under the contract. The impact of the "preferential reinstatement system" upon contractual seniority, rate-retention and displaced persons status is discussed below.

ment system". Company representative Hue explained on cross-examination the operation of this system, as follows:

* * *

Q. * * * Under the PRS, as I understand it, it operates to place the crossovers immediately in the jobs at which they worked before the strike, is that correct?

A. That's a result of it.

Q. That's how it operated?

A. Yes.

Q. And they all got immediate rate-retention?

A. No, they got paid the rate of the jobs they were reinstated to.

Q. If they did a lesser job, they retained their rate?

A. Sure. Just like everyone else.

Q. Okay. So the crossovers—And that was across-the-board in bindery and in the warehouse and the prep department and in the print pressrooms? The crossovers were all immediately reinstated to their old positions?

A. We had plenty of work for them.

Q. Okay. And then after that was done, after those people were taken care of, then the strikers moved into their position—moved into—were placed in certain positions, is that correct?

A. That was a result of the system, yes.

Q. Okay. And in the—In the bindery area, you followed bindery seniority in placing the strikers into remaining jobs, is that correct?

A. Bindery seniority in the classifications in which there were vacancies, except for gang operations, which were handled similar to what we had agreed to on the pressroom, and except for Class G and Class 2 classifi-

cation, which we agreed to pool and strictly fill by seniority because those were bottom jobs. And the Union suggested that.

Q. And in the pressroom, you called people back from web to web and—web people to web side and sheet fed people back to sheet fed jobs?

A. Web to web and sheet fed to sheet fed. That was the term.

Q. Okay. And we had the testimony about the progression of jobs in the pressroom and the—the strikers would—as the amount of work would return, they would, by seniority,—more pressroom strikers would return and would be assigned to the jobs not filled by the crossovers according to their unit seniority, is that correct?

A. That's correct.

Q. On the same side?

A. That's correct.

Q. And plate area, you got three classifications. You got—Well, you got—Is classification the proper word?

A. Yes.

Q. Prep, camera work, stripping work, and platemaking?

A. And general worker.

Q. And also general worker classification which works everywhere?

A. Right.

Q. And crossovers were placed in their jobs as journeymen, crossovers as journeymen?

A. Yes.

Q. And then [Management] brought the strikers in first to general worker and then to journeymen jobs as the amount of work expanded, is that correct?

A. Some returned directly to journeymen, as I recall.

Q. Do you recall who did?

A. I can't think of any names offhand, but I think a few came back directly to journeymen.

* * *

Hue was asked: "why did you use that method of getting people back to work on jobs they were familiar with?" Hue replied: "So we had a systematic method of getting people back to work on jobs they were familiar with." Hue acknowledged that "staffing" was not related to "rate-retention"—[Hue] could have done that with or without rate-retention." Hue also acknowledged that under the Employer's reinstatement system, "in very area there are * * * cross-overs in positions * * * where more senior strikers, who had the same position before the strike, are now in a less[er] position * * *".

Hue was specifically questioned about reinstatement in "the plate area". Hue agreed that there are "currently 4 journeymen plate makers"; 3 of them are "cross-overs" and 1 "is the most senior plate maker in the entire plant". Prior to the strike, there were "over 20 journeymen plate makers" and there are "still over 20 journeymen plate makers who are employees of the Company." Hue agreed that there is no "difference in terms of efficiency, training or shuffling between calling 4 plate makers back, the 4 most senior plate makers back * * *", thus "making jobs [available] in order of seniority * * *".

The record shows that employees who had abandoned the strike and crossed over the picket line during the 2 or 3-week period from September 13 to October 3, 1977, were reinstated to their pre-strike positions with full rate-retention in these classifications. This was true regardless of their seniority, the duties which they performed during the strike prior to October 8, 1977, and Company production demands. On the other hand, employees who had remained on strike until October 8, 1977, when the Union made its unconditional offer to return on their behalf, were called back into remaining positions (insofar

as there were any) which were essentially lower-rated and lower paying.

An example of the operation of this "preferential reinstatement system" may be found in the testimony of employee Don Williams. Williams had been employed by the Company for over 20 years. Williams recalled that on Friday October 7, 1977, he telephoned Hue and

> told Mr. Hue that I was willing to return to work the following Monday with or without the Union * * * but I would prefer to wait until the vote on the contract * * *, the next day * * *.

Hue asked Williams "if [he] knew what to do in case the vote didn't go that way" and Williams stated "I'd resign from the Union and come back." On Saturday October 8, the Unions, as noted, accepted the Employer's contract. On the following day, Sunday October 9, Company representative Tom Boll telephoned Williams and "asked [him] if [he] wanted to be on the preferential reinstatement list". Williams said: "no, I would go back with the Union." Williams reported to work the following week. He was hired back in the "one-color helper classification". Williams' classification before the strike was "four-color pressman". He returned to work in a significantly lower paying job. As noted, the "cross-overs" were reinstated to their pre-strike jobs and Williams observed this upon his return.

That the Employer recalled and reinstated employees who had elected to abandon the strike to their pre-strike jobs regardless of seniority and production requirements is demonstrated by Midway superintendent Rule's testimony. On November 7, 1977, there were 16 strippers working in the plant preparatory department. There had been "16 cross-overs that were strippers". There were also "4 camera people working" in that department and "it just happens that those are the 4 cross-overs in camera". Rule acknowledged that Management had

"retained all the people who crossed over during the strike in the preparatory department." Rule also acknowledged that "the fact that there were 16 strippers on November 7 doesn't reflect any decision by Management that [it] needed 16 strippers; it simply reflects that 16 strippers who were journeymen strippers crossed the line". Further, as Union steward Holcomb explained:

* * *

> in the plate room they have seniority and in the stripping department they have seniority and [in the] camera department [they] have seniority. The people that * * * crossed the picket line maintained their seniority. And the people that were called back, came in as general workers with exception of one. And they * * * stayed as general workers until there was an opening as journeyman. * * *

Union representative Grimmer also explained "that the people that crossed over in the press room retained their jobs"; "the rest of us worked around them. We'd move up when [an] opening occurred, but we'd have to move around them. They were holding higher jobs and had less seniority". Grimmer noted that the Employer had immediately placed the "cross-overs" into their pre-strike jobs. Indeed, as Company representative Hue explained, "we had already placed [the cross-overs] in their pre-strike jobs"—they "were going to remain in those jobs * * * whether they had no seniority or all seniority * * *".

Union representative Grimmer further observed that "cross-overs" acquired "rate-retention immediately after the strike." However, the returning strikers, in effect, did not receive their "rate-retention immediately upon their return" to their pre-strike positions.[31] Grimmer recalled that returning strikers,

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[31] As noted *supra*, employees may retain their normal wage rates when assigned to lower positions under their Union contracts. Grimmer claimed: "Once you are *permanently reinstated* to your former position, you get the rate * * *. That's rate-retention" (Emphasis added.)

unlike "cross-overs," were "trying to get back to their former classification". In the process, a returning striker would be assigned to a higher-rated job on a press. If the "press goes down for a day or two", the "cross-over", who may be performing the same or similar work, has rate-retention. The returning striker would not have rate-retention because Management would claim that the returning striker was performing this higher-rated job on a "temporary" basis. Grimmer recalled: "we asked how long it would take" to become "permanent" and thus acquire rate-retnetion status—"how long a temporary position would be temporary." Management responded: "it would be a matter of many, many months * * *".[32]

Counsel for the Unions also notes in his brief (p. 93) that the Local 32B contract defines a permanent vacancy for posting purposes as a position in which an employee did work or could work 500 hours in any 6-month period. See G.C. Exh. 5, p. 8. The Employer has applied this 500-hour provision to returning strikers in determining their permanency status. The "cross-overs," however, having been permanently reinstated to their pre-strike jobs, are not similarly affected by this 500-hour requirement. Union representative Schmeling illustrated this, as follows: A returning striker would "qualify to retain his B rate" when "the machine would run enough time to judge that an operator was needed and we used pretty much the code of 500 hours from the posting. And at that time, [the returning striker] was reclassified to his permanent rate and had rate-retention as a class B". In effect, returning strikers, unlike the "cross-overs," would have to satisfy this requirement in order to acquire permanent status for higher-rated positions.

Also in conjunction with the foregoing "rate-retention" provision, Local 32B's contract refers to "displaced persons".

[32] Grimmer specifically recalled that at a meeting with Management in January 1978, "I asked how long they figured was temporary" and Management responded, "9 or 10 months". Also see the testimony of Union steward Holcomb.

They are, as noted, persons whose machines or jobs have been eliminated or reduced in schedule. They are guaranteed in certain circumstances rate-retention. See G.C. Exh. 5, p. 8. Company representative Emmrich acknowledged that "cross-over" Bert Helms was a "displaced person"; that he "retained his displaced persons rights when he returned prior to October 8"; and that he "retains them now". Further, Union representative Schmeling testified:

* * *

Q. . . . Now, upon the return of these people for employment after the strike, of the 12 names on this list [of displaced persons], how many were recognized by the Company as displaced upon their return to work?

A. One.

Q. And who was that?

A. Bert Helms.

Q. And how many cross-overs are on this list?

A. One.

Q. And who's that?

A. Bert Helms.[33]

* * *

The record also shows that operators Ralph Zeinert and Richard Johnson worked on certain machinery before the strike which the Company had sold near the end of the strike. Counsel for the Unions argues that these 2 operators are entitled to displaced persons status because their machine has been eliminated. The Employer does not recognize this status because the 2 operators have not returned to their pre-strike positions. They cannot, however, return to those positions.

[33] Helms' status was apparently later changed by the Employer and became the subject of a grievance.

Company representative Emmrich claimed:

> The preferential reinstatement system doesn't provide for it, and they were not displaced before the strike. They were displaced during the strike.
>
> * * *
>
> Any displaced person that returns to the job that he had prior to the strike will then receive his displaced persons status.

Cf. R. Exh. 68, Tr. 1673-1674, 2004-2010.[34]

In summarizing the above segment of the record, I have relied upon the Company's bargaining notes. As noted in Section I, *supra*, I find these notes to be accurate and reliable. I also credit the testimony of Union representatives O'Connor, Holcomb, Grimmer, and Schmeling, employees Williams and Dewildt, and Company representatives Hue, Emmrich and Rule, as recited and quoted above. Their testimony, as recited above, when assessed in the context of the documentary evidence and the entire record, impressed me as both reasonable and reliable.[35] I note that much of the evidence summarized above is not disputed in any essential or material manner.

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[34] According to Schmeling, while the Local 32B contract calls for recall on the basis of unit seniority, once an employee is recalled into the plant his machine assignment is based on machine seniority. Employee Dale DeWildt, a returning striker, claimed that, following his recall to the plant, he was not assigned to his machine in accordance with his machine seniority. DeWildt noted the lesser machine seniority of "cross-overs". He also claimed that "cross-over" Underwood, with less machine seniority, would be "the last to go" under the Employer's application of its "preferential reinstatement system".

[35] Counsel for Respondent moves to strike Union steward Holcomb's testimony because he refused to answer certain questions propounded pertaining to an employee's misconduct. As discussed below, I have taken this factor into account. Nevertheless, Holcomb's testimony, as recited above, impressed me as reasonable and credible.

Rather, counsel for Respondent, in both his evidentiary presentation and post-hearing brief (Co. Br., pp. 104-127), principally controverts the interpretation of and inferences drawn by various General Counsel and Charging Party witnesses. Counsel for Respondent states that, under its "preferential reinstatement system", returning strikers "would not have the right to bump"; they "would receive the rate of the job to which they were reinstated"; and "reinstated strikers should enjoy no advantage over strikers who might be on a preferential reinstatement list with respect to *future* vacancies" (Co. Br., pp. 108-109, emphasis added.) The some 70 "cross-overs", who had abandoned the strike during the weeks prior to its termination by the Unions, had been "reinstated to their former jobs * * *" and, "because there were more than enough vacancies available" at that time, "application of seniority rights was never an issue" in their case (Co. Br., pp. 109-110). As counsel for Respondent observes, "these strikers were reinstated under the terms and conditions of employment in effect immediately prior to the strike * * *" (*Ibid.*)

Counsel for Respondent, in summarizing the operation of this "preferential reinstatement system", notes that the some 70 "cross-overs" "already had been reinstated to their former permanent job classifications" and "none" were "discharged, laid off or displaced to make room for other returning strikers". Counsel adds, these "cross-overs" enjoyed "no advantage" over those strikers who in fact "could be reinstated immediately to their pre-strike employment * * *" when the strike ended (Co. Br., pp. 118-120.) This, of course, "leaves * * * those [striking] employees eligible for reinstatement who could not be reinstated immediately to their pre-strike employment" (*Ibid.*) Counsel explains (Br., p. 120):

> Such employees have been placed in such vacancies as existed. The vacancies they are reinstated to are considered their regular "permanent job classification" * * *. As the Company's operations expand, more and more per-

> manent vacancies develop, employees are upgraded and reclassified. By means of this process, employees have or will eventually return to their same or substantially equivalent pre-strike employment when such positions exist * * *.

Counsel for Respondent, in discussing the "preferential reinstatement system" and the contractual "rate-retention" rights of employees (Br., pp. 122-124), states:

> The relationship of the PRS to rate-retention is a simple one. All strikers have rate-retention for the *regular permanent classification* (and job) to which they are assigned * * *. Since all [cross-overs] were reinstated to the same pre-strike employment, they retain the rate of their pre-strike classification, subject to certain exceptions * * *. The same is true [for the striking] employees whom the Company could immediately reinstate to the same or substantially equivalent employment. *All other employees have rate-retention for the regular permanent classification to which they are assigned at the time of their return. This will, of course, be a lower rate than they had prior to the strike* * * * [Emphasis added.]

And, later, counsel further notes that a returning striker, unlike a "cross-over", as he "progresses" to his pre-strike position, "may retain different rates along the way". Such an employee may receive a "higher rate" when working at a "higher rated job". However, this returning striker, while thus progressing up the ladder back to his pre-strike status, does not retain these higher rates "unless" he is "permanently classified" in the higher-rated position in accordance with the Unions' contract.

In addition, counsel for Respondent notes that, "under the PRS, a striker receives his displaced persons rate when he returns to his pre-strike job on a permanent basis" and "the problems with rate-retention are simply an incidental by product of the Company's refusal to displace less senior but previously reinstated strikers"—*i.e.*, the "cross-overs" (Co. Br., p. 124). And, with respect to the "PRS" and "machine

seniority", in connection with Local 32B's contract, the Company states (p. 126):

> Under the PRS, the operator with the greatest machine seniority who has been *permanently assigned* (classified) to the position is granted assignment preference irrespective of when he quit striking [Emphasis added.]

Discussion

Counsel for the General Counsel, in his post-hearing brief (pp. 28-34), argues that "Respondent's reinstatement system accorded for a substantial period of time a preference to strikers who chose not to continue engaging in their right to strike, and similarly disadvantaged those strikers who exercised their right to continue the strike". It is this "built-in disadvantage to employees" who exercised their protected right to strike until October 8, 1977, "that requires a finding that Respondent's reinstatement system is inherently destructive of employee rights." Counsel for the Unions, in his post-hearing brief (pp. 138-188), similarly argues that the Employer's reinstatement system "is inherently destructive of protected rights." Both counsel cite and rely upon in substantial part the Board's *rationale* as applied in *Erie Resistor Corporation,* 132 NLRB 621 (1961), and affirmed by the Supreme Court in *N.L.R.B.* v. *Erie Resistor Corp.,* 373 U.S. 221 (1963). Counsel for Respondent, in his post-hearing brief (pp. 128-150), argues that the "preferential reinstatement system proposed by the Employer and accepted by the Unions furthered legitimate Employer interests"; "it is not unlawful to grant some recognition to the order in which unconditional offers" for reinstatement "are made"; and the Board "should defer to the strike settlement agreement of the parties." Counsel for Respondent also notes that "the instant" reinstatement system "is virtually identical to the reinstatement system in *Bio-Science Laboratories,* 209 NLRB 796 (1974). In addition, counsel for Respondent acknowledges (p. 128) that "the Company was

obliged to reinstate employees, who had not engaged in strike misconduct sufficient to warrant discharge * * *, to their same or substantially equivalent employment, if such existed, displacing any replacements hired for their jobs, upon their unconditional application for reinstatement * * *". The order in *Banta I* also requires that such offers of reinstatement be "without prejudice to their seniority and other rights and privileges * * *".[36]

Erie Resistor, supra, involved an economic strike at its inception. The principal issue raised was whether the employer violated the Act when he extended a 20-year seniority credit to strike replacements and strikers who left the strike and returned to work. The Board concluded: "In our opinion, superseniority is a form of discrimination extending far beyond the employer's right of replacement sanctioned by" *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1937), " and is, moreover, in direct conflict with the express provisions of the Act prohibiting discrimination". The Board reasoned that "permitting an employer to grant superseniority to all who work during a strike greatly enlarges the definition of replacement as envisaged by *Mackay*"; "whereas the threat of replacement may solidify the strikers in their collective efforts, superseniority effectively divides the strikers against themselves" and

> renders future bargaining difficult, if not impossible, for the authorized collective bargaining representative. Unlike the right of replacement granted under *Mackay,* which ceases to be an issue once the employer decides to retain all replacements at strike's end, superseniority is a continual irritant to the employees and the union. Employees are henceforth set apart in two groups: those who stayed with

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[36] Although Respondent is bound by the Board's order in *Banta I* to reinstate the strikers under terms identical to the rights of unfair labor practice strikers, Respondent "strongly disputes that this was their status" (Co. Br., p. 129). As recited in Section 8, *supra,* the Board's order in *Banta I* and the obligations imposed thereby are binding upon the parties here.

> the union to the end and lost their seniority, and those who returned before the end of the strike and gained extra seniority * * *.

Thus, as the Board continued, "the effective reward of nonstrikers and punishment of strikers inherent in superseniority stands as an ever-present reminder of the dangers connected with striking and with union activities in general." Accordingly, the employer, by granting such superseniority, "clearly discouraged strike activities and union membership of employees"; "such was the inevitable result of the preference granted * * *"; and "where discrimination is so patent and its consequences so inescapable and demonstrable. * * *, General Counsel need [not] prove that Respondent subjectively intended such a result * * *". The Supreme Court agreed with the Board's reasoning, noting: "In the light of this analysis, superseniority by its very terms operates to discriminate between strikers and nonstrikers, both during and after the strike, and its destructive impact upon the strike and the union cannot be doubted." Also see, *Swan Rubber Co.*, 133 NLRB 375 (1961), enforced 303 F. 2d 668 (C.A. 6, 1962); and *Great Lakes Carbon Corp.*, 152 NLRB 988 (1965), enforced 360 F. 2d 19 (C.A. 4, 1966).

The holding of *Erie Resistor* is equally applicable and pertinent to the facts present in the instant case. Moreover, as the Court of Appeals concluded in *Great Lakes Carbon, supra,*

> the superseniority plan here has a more pervasive effect that the one condemned in *Erie Resistor.* This plan effects not only future layoffs, to which the *Erie Resistor* plan was limited, but also—the assignment of vacation times, preferred shifts and open jobs.

As will be discussed below, the Employer's plan in this case was also more pervasive than the plan condemned in *Erie Resistor.* Moreover, we are not concerned here with an employer hiring permanent replacements or with an employer granting *some*

recognition to the order in which unconditional offers for reinstatement are made. Rather, we are concerned with a reinstatement plan which, as implemented, is premised in large part upon a distinction between, on one hand, the "cross-overs" and, on the other hand, the strikers who waited until the strike's end. I find and conclude here that Management's reinstatement plan, as applied, was and is inherently destructive of employee Section 7 rights.

As stated, the Employer did not hire permanent replacements for the strikers. However, on September 9, 1977, the Employer apprised the strikers that Management "will continue to expand its production capabilities by whatever means are necessary including the hiring of new employees * * *". Earlier, Management had informed the Unions that there would undoubtedly be a substantial reduction in available unit jobs when operations resumed because of the loss of business. From September 13 to October 3, 1977, some 70 strikers had become "cross-overs", resigning from the Unions and abandoning the strike. Thereafter, at the meeting of the parties on Tuesday October 4, 1977, when the Employer first presented its "preferential resinstatement plan" to the Unions, Company representative Hue made clear to the Unions that Management, in effect, had been "begged" by the "cross-overs" "not to let them down" in the anticipated schism between the "cross-overs" and the strikers who had not abandoned the strike. As demonstrated herein, the Employer's proposed "preferential reinstatement system" only served to exacerbate further this anticipated division between " cross-overs" and remaining strikers.

In the past, Management had utilized its contractual provisions pertaining to recall from layoff in reinstating strikers. These provisions were and are premised essentially upon seniority. Moreover, in the past, there had been insufficient jobs available for returning strikers at the strike's end and the Employer had not been compelled to honor contractual rate-retention provisions when reinstating the strikers by seniority.

However, in the instant case, Management dismissed as "unworkable" these contractual recall provisions. Instead, Management utilized a reinstatement plan which, as implemented, placed the "cross-overs" immediately into the jobs they worked before the strike without regard to what functions the "cross-overs" were performing during the strike and Management's immediate production needs. Consequently, the "cross-overs" were granted their pre-strike rates, full contractual rate-retention and, where applicable, contractual displaced persons status. And, as Company representative Hue acknowledged, under this reinstatement plan, as implemented, "in every area there * * * are cross-overs in positions * * *, where more senior strikers, who had the same position before the strike, are now in a less[er] position * * *". Further, returning strikers were precluded from "bumping" the "cross-overs" under this plan which, by its terms, was to be effective until October 1980. Indeed, Management made clear to the Unions at the meeting on Tuesday October 4, that the Employer "didn't want to bump the people that were in there already"—it "didn't want the strikers to move ahead of the people that were in there." The strike, as noted, ended four days later on Friday October 8, 1977.

The built-in discrimination of this reinstatement plan may be illustrated by a few examples of its actual operation. Employee Don Williams had worked for the Company for some 20 years. He was classified as a four-color pressman prior to the strike. On Friday October 7 he apprised Management that he "was willing to return to work the following Monday with or without the Union * * * but * * * would prefer to wait until the vote on the contract * * *." On Saturday October 8 the Unions accepted the contract. On Sunday October 9 Management asked Williams if he wanted to be "on the preferential reinstatement list". Williams replied no, he "would go back with the Union." Consequently, Williams—instead of being reinstated to his pre-strike position as a "cross-over"—was

reinstated the following week to a significantly lower paying position.

Moreover, as stated, the "cross-overs" were assigned their pre-strike positions. However, the returning strikers were often reinstated, if at all, to remaining lesser paying jobs. The returning strikers would thereafter attempt to work their way back up the various levels of job classifications to their pre-strike positions. However, as Union representative Grimmer explained, if a machine closed down during a striker's effort to work back to his pre-strike status, the returning striker—unlike the "cross-over" who might be doing the same or similar work with less seniority—would not have contractual rate-retention unless and until Management determined that the returning striker had satisfied a test of "permanency" at the particular level in this progression. A returning striker could thus be required to work a number of months at a job without being classified as permanent.

In sum, the Employer's reinstatement plan, as implemented, awarded substantial priority to the "cross-overs". Strikers were only recalled to remaining jobs. "Cross-overs" were reinstated to pre-strike positions and returning strikers at the strike's end were in significant part recalled to lower-rated positions. "Cross-overs" retained and received full contractual rate-retention rights to their pre-strike jobs; however, returning strikers were often required to meet tests of permanency in order to have rate-retention status to various higher-rated jobs. Returning strikers were similarly denied displaced persons and machine seniority rights by operation of this plan.

A reinstatement plan predicated so heavily upon a distinction between employees who abandoned the strike (during the weeks before the strike's end) and those employees who remained on strike until the strike's end, is inherently discriminatory and unlawful under the *Erie Resistor rationale*. Moreover, although the Employer attempted here to show

legitimate business reasons for this reinstatement plan—*i.e.*, placing strikers "back to jobs and departments in which they are faimiliar"; "avoiding retraining" and "continual reshuffling"; and controlling rate-retention during the resumption of operations—these and related reasons do not privilege a plan which, in effect, discriminates between "cross-overs" and returning strikers at strike's end (*Ibid.*) In any event, Management's asserted business reasons for its reinstatement plan do not withstand close scrutiny. Here, Management could have achieved essentially these same business objectives without drawing a line of demarcation between "cross-over" and returning striker. For, in the past, Management had not been precluded by the Unions from utilizing its layoff recall provisions without rate-retention where insufficient jobs were available at strike's end. And, a qualified "cross-over" is no different for business purposes than a qualified returning striker. Nor is Management compelled to endure "reshuffling" or related problems during a start-up following such a strike. In sum, the plan invoked here is inherently discriminatory and Management's asserted business reasons for its implementation do not justify or privilege this discrimination.

Counsel for Respondent argues that the Board should "defer to the settlement agreement of the parties"; "here the PRS was agreed to by the parties * * *"; and this "reinstatement system * * * constitutes a clear and unmistakable waiver of rights * * *" (Co. Br., pp. 136-145). However, the evidence of record makes clear, and I find and conclude that, the Unions did not, by their strike settlement agreement and related conduct, waive their right to challenge this reinstatement plan as illegal before the board. On the contrary, the Unions maintained throughout this critical period that this reinstatement plan, as implemented, was unlawful. There has been no showing here of a clear waiver of the employees' statutory rights and, in any event, as the Board noted in *Erie Resistor, supra,* 132 NLRB at 631 n. 31, "* * * we would not in our

discretion honor a private settlement which purported to deny employees the rights guaranteed them by the Act". The Court of Appeals, on remand, later sustained this determination in *Erie Resistor, supra,* 328 F. 2d 723, 727 (C.A. 3, 1964).[37]

Counsel for Respondent places great emphasis in his brief (pp. 3-4) upon certain statements made by counsel for General Counsel at the hearing to the effect that if the strike involved in this case is found to be an economic strike than there is no Section 8(a)(3) violation as alleged. Counsel for General Counsel made these and related statements often when being pressed to explicate his position. Counsel for General Counsel also argued that the reinstatement plan, as implemented, was inherently discriminatory. Counsel for General Counsel, as noted, now cites and relies upon in substantial part *Erie Resistor* and related cases. And, as stated, *Erie Resistor* involved an economic strike at its inception. In sum, under *Erie Resistor,* it makes no difference here whether or not the instant strike was or was not an unfair labor practice strike. Counsel for General Counsel's understanding to the contrary is not binding upon the Board. Moreover, Respondent has not in any way been prejudiced by counsel for General Counsel's state-

[37] Counsel for Respondent, as noted above, relies in large part on cases like *Bio-Science Laboratories, Inc.,* 209 NLRB 796 (1974). The facts in the instant case are clearly distinguishable. Here, unlike in *Bio-Science,* the Employer, following the issuance of an unfair labor practice complaint in *Banta I,* had agreed to reinstate the strikers under terms identical to those afforded to unfair labor practice strikers. Cf. *Neuhoff Packing Co.,* 28 NLRB 746, 768 (1941), enf'd 127 F. 2d 30 (C.A. 6, 1962); *Lytron, Inc.,* 207 NLRB 554, 559 (1973). Further, in *Bio-Science,* the Board "was concerned with the employer's insistence upon his right to retain permanent replacements at the end of the strike and an orderly procedure for recalling strikers as vacancies arose without" violating the Act. *Bio-Science* did not involve a reinstatement plan which, as implemented, was premised in significant part upon the distinction between strikers who had abandoned a strike and strikers who remained on strike until the strike's end.

ment of position. A reading of this full record makes it quite clear that the pleadings amply support the findings made and that the Employer fully and completely developed the facts pertaining to the reinstatement plan, the operation of the plan, and Management's alleged business reasons for the plan.

In sum, I find and conclude that Respondent violated Section 8(a)(1) and (3) of the Act by granting from on or about October 10, 1977, and thereafter, preferential reinstatement rights and preferential seniority rights to jobs and rates of pay to those employees who had abandoned the strike before strike's end and, further, by denying seniority and the benefits of seniority for purposes of job assignment and computation of rates of pay to those employees who remained on strike until strike's end.[38]

III. The Discharge of Strikers For Alleged Acts of Misconduct

The Employer has discharged certain strikers because of alleged acts of misconduct. The pertinent evidence is summarized below:

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[38] Counsel for General Counsel was permitted to amend his consolidated complaints at the hearing to allege that Respondent further violated Section 8(a)(3) by engaging in a "course of conduct" from about October 25, 1977, "designed to deny seniority, pay and other rights and privileges to the strikers who remained on strike * * * by seeking to withdraw from the Board settlement" in *Banta I.* Although not determinative, it is noteworthy that a related claim that such conduct was violative of Section 8(a)(5) of the Act, was dismissed by General Counsel, who stated: "It appears that Employer's attempt to withdraw from a formal Board settlement stipulation does not violate the duty to bargain in good faith * * *". The present claim is differently phrased here and goes to the Section 8(a)(3) allegation. The Court, in *Banta I,* as quoted above, fully explained the asserted reasons for Management's attempted withdrawal and rejected the withdrawal. The record before me does not in any way establish that the Employer's unsuccessful attempt to withdraw from the settlement runs afoul of Section 8(a)(3) of the Act. I would therefore dismiss this allegation.

A. *Richard Pontow:*

Richard Pontow had been employed by the Company for about 20 years. He struck until October 8, 1977. He was later recalled on November 28, 1977. He was terminated on the following day, November 29, for "pulling over a fence post" during the strike. The fence, as Company representative Emmrich testified, was "put up by the Company in connection with the strike" and it "had barbed wire on it." It has since been removed. Pontow recalled that the particular post involved was a "four by four piece of shoring of boxcar with some barbed wire on it". At first, Pontow, as he further testified, told Management that he "didn't do it". Later, Pontow telephoned Company president Donald Koskinen,

> and I [Pontow] told him that I was in the hospital * * * going under AA treatment, that part of the program was being honest with yourself and with others, making amends. And I told him I was driving the truck that snapped off the fence post * * *, which I had denied up until then.

Pontow asked Koskinen for his job. Koskinen said that "he would see what he could do". Pontow later spoke with Koskinen again. This time Koskinen said that Pontow "shouldn't have got that severe punishment" and "he'd do what he could." Subsequently, Koskinen advised Pontow to speak with Emmrich. Pontow telephoned Emmrich, however, Emmich did not reinstate Pontow.

The incident involving the fence post had occurred on July 9, 1977. Pontow, in his testimony, insisted that "a cable" had been tied to his vehicle without his knowledge and that, as he drove his "jeep away", he "snapped" the post. The post was promptly repaired. As Pontow recalled, "they took a couple of pieces of one-inch board and nailed a fence post back up when I cut it in half with the cable."[39]

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[39] Mark Elliot, a security guard, observed pickets attach a chain

(Footnote continued on following page)

B. *Donald Bojarski:*

Donald Bojarski had been employed by the Company for about ten years. He remained on strike until October 8, 1977. He was recalled on December 5, 1977, and two days later, on December 7, was terminated for damaging a steel cyclone fence on August 16, 1977. Bojarski testified that he had "admitted" to Management "backing into the gate" and had "offered to pay for it". Company representative Emmrich "didn't think that was enough punishment, so I [Bojarski] would have to be fired." Bojarski explained the incident, as follows:

> I had been drinking. I went out to the picket line to see what was happening. And I got in my truck and accidentally backed into the gate.

He was criminally charged and paid a $50 fine. The fence was later repaired.[40]

C. *Dean Schreiner:*

Dean Schreiner had been employed by the Company for about 15 years. He struck until October 8, 1977, and served as a picket captain. He was recalled on January 30, 1978, and, on the following day, January 31, was discharged for assaulting a temporary replacement, Dennis Berkin, in a local restaurant on September 28, 1977. Schreiner testified that Company representative Emmrich apprised him that he was under investiga-

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(Footnote continued from preceding page)

to the fence; the driver was out of the jeep; the driver got into the jeep; and the post "broke off". Also see the testimony of Steve Faulkner, another security guard. Emmrich recalled that the cost of repairing the post was "something in excess of $100, I would imagine."

[40] Bojarski admitted on cross-examination that he had acknowledged previously in his pre-hearing affidavit that "he drove into the gate deliberately". Also see the testimony of security guards Gary Cernohous and Joe Schifferele. The damage was about $200.00.

tion for this misconduct. Schreiner, as he further testified, explained to Emmrich "what happened", as follows:

* * *

> I [Schreiner] told him [Emmrich] I was down at the tavern in Menasha, the W-W Bar; a girl came in and said that she was being harassed by a scab at Mihm's [restaurant] and I decided to go see what was going on.
>
> * * *
>
> And I walked in there and this individual said, there he is over there. And I went over and talked to the individual [Berkin] and asked him what was going on. And we started arguing back and forth and he grabbed my arm. That was when I shoved him against the booth and said let go of my arm.[41]

Berkin did not testify; however, Gerald Sell, a person who was also present with Berkin during the incident in Mihm's, did testify. Sell recalled how two female customers at Mihm's "started hassling" Berkin as a "replacement worker"; they called Berkin a "scab"; and "they exchanged words". Berkin "was * * * more or less cocking off, smarting off * * * laughing about it * * * ". Then, one of the two female customers left and returned with Schreiner. Schreiner, after exchanging some words with Berkin, said to Berkin, "why don't we step outside"; more "words were exchanged"; and Schreiner,

> after a few minutes, * * * put his hand around Dennis' throat and pushed him back against the backrest of the chair, the booth.

Berkin had not "touched" Schreiner. Later, the police arrived.

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[41] Schreiner also recalled that the police arrived during this incident; that he was later arrested; and that he paid a $50 fine as a result of his conduct.

D. *Alan LaSelle:*

Alan LaSelle had been employed by the Company for 12 years; he struck until October 8, 1977; he was recalled on November 30, 1977; and on the next day he was discharged for "two different incidents" of misconduct during the strike. LaSelle identified the two incidents: (1) "For throwing an object at one of the scab's cars, and (2) the other one was for hassling two scabs in a bar one * * * afternoon" LaSelle recalled the so-called "Office Bar" incident during mid-September 1977, as follows:

> * * * We walked in the Office Bar and there were two scabs playing pool. And we went over there to talk to them, which amounted to arguing back and forth.[42]
>
> * * *
>
> We were trying to tell them they were taking our jobs from us and they came back with just the opposite.

Although LaSelle claimed that there was no pushing or shoving "to his knowledge", he also recalled that the "bar manager came over and broke it up * * * " and said "hey don't fight in here". There was "hollering * * * back and forth across the bar, but that was about it". LaSelle admittedly "did grab one of the scab's pool cues because there was two of them"—"I did hold it under his chin, but I didn't stick it—stick him with it or anything like that". The incident ended.

The two temporary replacements involved in this incident were Robert Rajski and Mark Stadtmueller. Rajski testified that LaSelle and Bressers "walked in the door" of the bar and

> they grabbed Mark and pinned him against the wall * * * they both grabbed him and they just pressed him against the wall.

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[42] LaSelle was with another employee who was also striking, James Bressers.

Rajski could not "remember" what was said. This incident lasted "about a minute or two". Rajski added: "They took the pool cue and put it under [Mark's] chin". Rajski explained that LaSelle "did that". Further, Rajski testified:

> They started saying stuff about, you took our jobs, and our wives and kids * * * and I've got house payments and stuff, and I just said it's not our fault, we needed the work * * *.

Rajski also recalled that one of the two strikers warned: "cross the line tomorrow and you're dead". Rajski responded to the strikers that the "law's on our side". The strikers, which one is unclear, stated:

> You can take that money you've been earning and spend it on doctor bills, and you want your teeth rearranged, and stuff like that.

The bar manager, James Helbing, then asked the two temporary replacements to leave. Rajski admittedly went to work the next day. The bar manager, Helbing, saw no evidence of bodily contact. Helbing, however, was working elsewhere in the building when this incident initially started.

LaSelle next described the "throwing an object" incident, as follows:

> We were picketing * * * and this was in the afternoon * * * when [the temporary replacements] were getting out. And the car in question went out the east exit. And then it came by and passed us. There was about 20 or 25 of us standing out there picketing. And they went by us and somebody threw something at the car and hit it.

LaSelle was identified as the person who "threw" the object. LaSelle denied that he had thrown the object.[43]

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[43] Union steward Holcomb testified that he witnessed the above incident; that he believed "hickory nuts" were thrown at the vehicle; that LaSelle did not throw any object; and that the police warned

(Footnote continued on following page)

E. *Robert Fox and Richard Ahrens:*

Robert Fox and Richard Ahrens had been employed by the Company 15 and 12 years, respectively. They both struck until October 8, 1977. Fox was a picket captain. Fox was recalled on December 5 and discharged on December 7, 1977. Ahrens was recalled on November 28 and discharged on December 2, 1977. They were both discharged as the result of a car-following incident concerning temporary replacements. Fox testified that during July 1977,

> we were out on the picket line when the employees getting out of work used to line up and come through * * *. We noticed that a couple of cars with these temporary or replacement workers * * * seemed to be thinking this was a joke, or something, laughing and stuff like this. And we started making catcalls at them and stuff like this. And when this car drove through the line, one of them made a gesture at us * * *.

Consequently, Ahrens and Fox "followed them". The followed car initially dropped off two passengers at a bar, the Rustic Inn. Then, the car drove to a nearby Hudson gas station. Fox further testified:

* * *

> We went up to the car, we parked right in back of them, or along side of them. Something. I know we just pulled up, parked. Got out of the car. Went up to the car, and then started talking to them. Asking them if they knew what the heck they were doing. And taking our jobs and stuff like that. You know. And this one—I don't recall any names. I called it Secors or something like that. But I can't put a face with the names. One of them said he could work

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(Footnote continued from preceding page)

some other individual at the picket line "that he shouldn't show up at the picket line for a while". On cross-examination, Holcomb refused, when directed, to identify the person actually responsible for the incident.

> where he damn pleased and all this and that, you know. And I got mad, and I was gonna hit him. Took his glasses off. And, then, I changed my mind. Then he got up, went in the gas station, I guess his dad owned the place or something. I'm not sure. And then we started just talking to them. I imagined there was threats made. I can't remember exact words said. There was a lot of cussing, but there was a lot of—we were just trying to explain to these kids, too, what the heck—did they realize what the heck they were doing. Just being out of high school and pulling something like they were doing. Then, we got back in the car and went down to a tavern where they had one of the other fellas off. And we talked to him at the tavern.
>
> * * *

Fox was asked, what happened at the tavern? He replied: "Same thing. We just talked to the guy."[44]

Michael Secor, one of the temporary replacements involved in this incident, recalled that the Fox-Ahrens vehicle "blocked" him at the Hudson gas station; Fox "asked me if I was going to go back to work and I said yes, then he reached in and grabbed for my glasses * * *"; I got out of the car and went for their license number" and they "just pushed me and stuff like that, that I shouldn't—that I can't go back to work there * * *"; and they "kept poking me in the chest and pushing me and stuff like that." Michael Secor further explained:

> I tried to go around them and then Richard Ahrens tried to stop me and then told me he's shove my glasses down my throat if I went back to work * * *.

Michael Secor "told them [he] wasn't going to go back to work

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[44] Ahrens recalled that at the Hudson gas station, "one kid took off running; he ran down the street right away; and we talked to this other guy." They later left the gas station and went to the Rustic Inn and there they "tried to explain to this kid what he was doing." Ahrens acknowledged that "there might have been" pushing or shoving—"it was just finger pointing back and forth at each other."

there and they left [him] alone." Michael Secor also recalled that Fox said: "They'd break my legs and arms". Secor's glasses were broken.[45]

Stephen Bartz, a temporary replacement, related what happened at the Rustic Inn. There were five persons, including Fox and Ahrens, who spoke with Bartz on the back porch of the bar. Bartz testified: "I was threatened with my life several times" by Fox. Fox said: "We'll fix it so you never work again. We'll break every bone in your body, and if you ever cross the picket line again that will be it." The bar owner helped disperse the five individuals. Bartz "was poked in the chest and pushed around" by Fox and the others.[46]

Although I generally credit Pontow's recitation of the fence post incident, I am also persuaded here that he in fact was aware that a chain was being tied to his vehicle. In short, I believe that Pontow, like Bojarski, intentially damaged the Company's fence during the strike. Indeed, Bojarski admitted this to a Board agent in his affidavit. Further, with respect to the Schreiner incident at Mihm's restaurant, I credit Sell's version of the confrontation. I find that Schreiner, having been set in motion by a complaining co-striker, entered the restaurant with the intention of fighting Berkin. In fact, Schreiner put his hands on Berkin's throat and pushed him against the chair. I do not credit Schreiner's assertion that Berkin "grabbed" his arm first.

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[45] Patrick Secor, Michael's brother, also recalled the incident. He explained that a second car with other persons was also involved. The unidentified occupants in this second car "pushed" and admonished Patrick Secor. Later, Fox "poked" Patrick Secor. Patrick Secor made clear to these individuals, including Fox and Ahrens, that he was not going back to work.

[46] Bartz recalled that Fox later repeated: "if I [Bartz] ever went back to work that would be it for me." Michael Hanna, the owner of the Rustic Inn, recalled how the pickets had Bartz "pinned in the corner" on the porch; Bartz "didn't dare move"; and there "was a lot of words flying."

Turning to LaSelle and the Office Bar and object throwing incidents, I credit Rajski's recollection of what transpired in the bar as quoted above. LaSelle's testimony in large part corroborates Rajski. However, I am persuaded that LaSelle, in the second incident cited, did not throw any objects at a car crossing the picket line. I credit LaSelle in this respect. I have also taken into account Holcomb's refusal to identify the responsible individual on cross-examination. Nevertheless, on the entire record, LaSalle and Holcomb candidly related this second incident.

Finally, as for Fox and Ahrens, I find them both to be unreliable and incredible witnesses. I credit as complete and reliable the recollections of Michael and Patrick Secor and Bartz as quoted above.

Discussion

Under settled principles a striking employee may disqualify himself for reinstatement by engaging in serious acts of misconduct during a strike. "The question in each case is whether, under the circumstances, the alleged misconduct of the striker is sufficient to justify the refusal to reinstate." *W. J. Ruscoe Company* v. *N.L.R.B.*, 406 F. 2d 725, 727 (C.A. 6, 1969). For every act of impropriety on the part of a striking employee does not automatically deprive the employee of the protection of the National Labor Relations Act. As the Seventh Circuit stated in *N.L.R.B.* v. *Illinois Tool Works,* 153 F. 2d 811, 815-816 (C.A. 7, 1946):

* * *

> We believe, as petitioner argues, that courts have recognized that a distinction is to be drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in "a moment of animal exuberance" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941) or in a manner not

activated by improper motives, and those flagrant cases in which misconduct is so violent or of such serious character as to render the employees unfit for further service, cf. *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) and *Southern Steamship Co.* v. *N.L.R.B.*, 316 U.S. 31 (1942), and that it is only in the latter type of cases that the courts find that protection of the right of the employees to full freedom in self-organization activities should be subordinated to the vindication of the interests of society as a whole.

* * *

The Board, in striking the balance required under the foregoing principles, has determined that threats of physical violence and property damage constitute "serious misconduct" justifying the refusal to reinstate a striking employee. See, generally, *Firestone Tire & Rubber Company*, 187 NLRB 54 (1971), enforcement denied, 449 F. 2d 511 (C.A. 5, 1971); *Terry Coach Industries, Inc.*, 166 NLRB 560, n. 2, 563-564 (1967), enf'd, 411 F. 2d 612 (C.A. 9, 1969). Moreover, the Board, in determining whether reinstatement of unfair labor practice strikers will effectuate the policies of the Act, "will balance the severity of the employer's unfair labor practice which provoked the industrial disturbance against whatever employee misconduct may have occurred in the course of the strike." *N.L.R.B.* v. *Thayer Co.*, 213 F. 2d 748 (C.A. 1, 1954), cert. den., 348 U.S. 883; *Golay & Co.* v. *N.L.R.B.*, 371 F. 2d 259 (C.A. 7, 1967), cert. den., 387 U.S. 944. And, even in cases involving economic strikers, the cited conduct of the strikers must be viewed in context of a lengthy strike and months of unsuccessful bargaining. Cf. *New Fairview Hall*, 206 NLRB 688 (1973), enf'd, 520 F. 2d 1316 (C.A. 2, 1975).

On this record, assessed in the context of a six-month strike following bargaining sessions where Management made clear that employee benefits achieved over past years must be reduced for economic reasons, I find and conclude that the

isolated and deliberate acts of property damage by Pontow and Bojarski, as discussed above, were not of such a serious nature so as to deprive them of the protection of the Act. Pontow's limited damage to a temporary fence post and Bojarski's limited damage to a fence for which he had "offered" to pay, although not to be condoned, are not of such a serious nature so as to justify their terminations. Further, although I encounter greater difficulty in the case of Schreiner, I am persuaded here that Schreiner, urged on by the complaints of a female co-striker, went into Mihm's restaurant and incited an argument with temporary replacement Berkin. Berkin, according to Sell, had been "smarting off." While all this does not privilege Schreiner's grabbing of Berkin, the incident was brief and, in my view, constituted an isolated moment of animal exhuberance. I would therefore not regard this incident as sufficient to deprive Schreiner of the protection of the Act.

However, I find and conclude differently in the cases of LaSelle, Fox and Ahrens. They intentionally threatened and assaulted temporary replacements. They engaged in acts of violence and made threats of violence. Their conduct can not be justified even assessed in the above context. I would deny them the protection of the Act.

In sum, Respondent violated Section 8(a)(1) of the Act by discharging employees Pontow, Bojarski and Schreiner for the cited acts of misconduct. The record, however, does not sufficiently establish in my view a further violation of Section 8(a)(3) in their cases. General Counsel has not proven that Respondent, in discharging these three individuals, also discriminated against them because of their Union or protected activities. On the contrary, the record shows that Management acted in a nondiscriminatory manner with respect to all striking employees suspected of misconduct during the strike. As for the remaining three employees named in the complaint, I

would dismiss the pertinent allegations as not sufficiently proven.[47]

Conclusions of Law

1. Respondent Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Charging Party Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent Company violated Section 8(a)(1) and (3) of the Act by granting from on or about October 10, 1977, and thereafter, preferential reinstatement rights and preferential seniority rights to jobs and rates of pay to those employees who had abandoned the strike with the Unions (which had commenced on April 4, 1977) before the strike's end on October 8, 1977, and, further, by denying seniority and the benefits of seniority for purposes of job assignment and computation of rates of pay to those employees who remained on strike until the strike's end.

4. Respondent also violated Section 8(a)(1) of the Act by discharging employee Richard Pontow on or about November 29, 1977, by discharging employee Donald Bojarski on or about December 7, 1977, and by discharging employee Dean Schreiner on or about January 31, 1978.

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[47] General Counsel argues in effect that Respondent waived its right to discharge the six employees for strike related misconduct by waiting until the employees were reinstated. The record shows that Respondent made clear to these six employees and others suspected of misconduct upon their return to work that Management was not waiving or condoning their suspected acts of misconduct. Shortly after recall, each was terminated. This record does not show a waiver or condonation. See G.C. Exh. 23, the form letter given to the reinstated strikers who were suspected of misconduct. Cf. *K-D Lamp Division, Concord Control, Inc.*, 228 NLRB 1484, 1492-1493 (1977).

5. Respondent has not committed other violations of the Act as alleged in the consolidated complaints.

6. The unfair labor practices found herein affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Respondent Employer has been found to have violated Section 8(a)(1) and (3) of the Act by discharging strikers and by implementing an inherently discriminatory reinstatement plan. Respondent will be directed to cease and desist from engaging in such conduct and, in view of the widespread and egregious nature of the violations, from in any other manner impinging upon employee Section 7 rights. Respondent will also be directed to post the attached notice.

With respect to the three strikers unlawfully discharged for cited acts of strike misconduct (Pontow, Bojarski and Schreiner), Respondent will be directed to offer to them full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by reason of their unlawful discharges, as found above, by paying to them a sum of money equal to that which they normally would have earned from the date of their terminations to the date of Respondent's offer of reinstatement, less net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[48] Further, Respondent will be directed to preserve and make available to the Board, upon request, all payroll records and reports, and all other records necessary and useful to determine

[48] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB No. 716 (1962).

the amount of backpay due and the rights of reinstatement under the terms of this Decision.

Further, as the Court of Appeals noted in *Banta I*, the settlement agreement executed by the Respondent Employer on July 22, 1977, "includes a statement of the striking employees reinstatement rights which coincide precisely with those of unfair labor practice strikers." Notwithstanding this agreement, the Employer, commencing on or about October 10, 1977, implemented a reinstatement plan which I have found to be inherently discriminatory because it is essentially premised upon a demarcation between those striking employees who abandoned the strike and those striking employees who waited until the strike's end on October 8, 1977. In order to effectuate the purposes and policies of the Act and to remedy this unfair labor practice as found above, Respondent will be directed to restore the *status quo before* the implementation of its unlawful reinstatement plan. Thus, Respondent will be directed to rescind in full its preferential reinstatement plan and any implementation thereof; and insofar as it has not already done so, to offer to all striking employees who applied unconditionally for reinstatement, including those who had abandoned the strike before the strike's end, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, displacing if necessary any reinstated employees who returned to work before the strike's end. If there are not enough positions for all the remaining striking employees, including any displaced as provided above, the available positions will be distributed among them, without discrimination because of their Union membership, activity or participation in the strike, following such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of the Employer's business. Those striking employees for whom no employment is immediately available after such distribution will be placed on a preferential hiring list

and thereafter, in accordance with the list, be offered reinstatement as positions become available and before other persons are hired for such work. Reinstatement, as provided herein, will be without prejudice to the employees' seniority or other rights and privileges.

In addition, Respondent will be directed to make whole those former strikers who were discriminated against by the implementation of Respondent's reinstatement plan, as found unlawful herein, by making payment to each of them of a sum of money equal to the amount he or she would normally have earned from the date of Respondent's unlawful implementation of its reinstatement plan, on or about October 10, 1977, to the date of Respondent's offer of reinstatement or placement on a preferential hiring list as provided above, less net earnings during said periods, with interest thereon, as provided and computed above.

ORDER[49]

Respondent Banta Division, Geroge Banta Company, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging its employees because they have engaged in protected concerted activities;

(b) Granting preferential reinstatement rights and preferential seniority rights to jobs and rates of pay to those of its employees who abandoned a strike with

[49] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Graphic Arts International Union, Local No. 88L, AFL-CIO-CLC, Graphic Arts International Union, Local No. 32B, AFL-CIO-CLC, and Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO-CLC, and denying seniority and the benefits of seniority for purposes of job assignment and computation of rates of pay to those of its employees who remained on strike with the above Unions until the strike's end;

(c) Maintaining or giving effect to its preferential reinstatement system, as found unlawful in this Decision, or any other reinstatement system which discriminates against those of its striking employees who remained on strike with the above Unions until the strike's end;

(d) Discouraging membership in said Unions, or any other labor organization, by in any other manner discriminating against its employees with respect to their hire or tenure of employment or any term or condition of employment;

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act:

(a) Offer to employees Richard Pontow, Donald Bojarski and Dean Schreiner immediate and full reinstatement to their former positions or to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings sustained, in the manner set forth in this Decision;

(b) Rescind in full its preferential reinstatement system and any implementation thereof, as found unlawful in this Decision, and restore all of its striking employees to the seniority and other rights and privileges they would

have enjoyed absent this reinstatement system and implementation thereof;

(c) Insofar as it has not already done so, offer to all of its striking employees who applied unconditionally for reinstatement, including those who abandoned the strike before the strike's end, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, displacing if necessary any reinstated employees who returned to work before the strike's end. If there are not enough positions for all remaining strikers, including any displaced as provided above, the available positions will be distributed among them without discrimination because of their Union membership, activity or participation in the strike, following such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of Respondent's business. Those striking employees for whom no employment is immediately available after such distribution will be placed on a preferential hiring list, as provided in this Decision;

(d) Make whole those of its striking employees who were discriminated against by implementation of its preferential reinstatement system for any loss of earnings sustained, as provided in this Decision;

(e) Preserve and make available to the Board or its agents all payroll and other records, as provided in this Decision;

(f) Post at its offices and facilities in Menasha, Wisconsin, copies of the notice attached hereto as "Appendix."[50] Copies of said notice, on forms provided by the

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[50] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELA-

(Footnote continued on following page)

Regional Director for Region 30, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that notices are not altered, defaced, or covered by any other material;

(g) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Decision what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of the consolidated complaints not specifically found unlawful herein be dismissed.[51]

Dated, Washington, D. C. October 15, 1979

FRANK H. ITKIN

Frank H. Itkin
Administrative Law Judge

(Footnote continued from preceding page)

TIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[51] General Counsel's motion to correct the transcript, dated January 10, 1979, which is unopposed, is granted.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A HEARING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT BANTA DIVISION, GEORGE BANTA COMPANY, INC., HAS VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO POST THIS NOTICE. WE THEREFORE NOTIFY YOU THAT:

WE WILL NOT discharge our employees because they have engaged in protected concerted activities.

WE WILL NOT grant preferential reinstatement rights and preferential seniority rights to jobs and rates of pay to those of our employees who abandoned a strike with Graphic Arts International Union, Locals No. 32B or 88L, and Tri-Cities Local No. 382, Graphic Arts International Union, AFL-CIO-CLC, and deny seniority and the benefits of seniority for purposes of job assignment and computation of rates of pay to those of our employees who remained on strike until the strike's end.

WE WILL NOT maintain or give effect to the preferential reinstatement system, found unlawful by the Board in its

Decision, or any other reinstatement system which discriminates against those of our striking employees who remained on strike with the above Unions until the strike's end.

WE WILL NOT discourage membership in said Unions, or any other labor organization, by in any other manner discriminating against our employees with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer to employees Richard Pontow, Donald Bojarski and Dean Schreiner immediate and full reinstatement to their former positions or to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings sustained, in the manner set forth in the Board's Decision.

WE WILL rescind in full our preferential reinstatement system and any implementation thereof, as found unlawful in the Board's Decision, and restore all of our striking employees to the seniority and other rights and privileges they would have enjoyed absent this reinstatement system and implemention thereof.

WE WILL, insofar as we have not already done so, offer to all of our striking employees who applied unconditionally for reinstatement, including those who abandoned the strike before the strike's end, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, displacing if necessary any reinstated employees who returned to work before the strike's end. If there are

not enough positions for all the remaining strikers, including any as displaced above, the available positions will be distributed among them without discrimination because of their Union membership, activity, or participation in the strike, following such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of our business. Those striking employees for whom no employment is immediately available after such distribution will be placed on a preferential hiring list, as provided in the Board's Decision.

WE WILL make whole those of our striking employees who were discriminated against by unlawful implementation of our preferential reinstatement system for any loss of earnings sustained by them, as provided in the Board's Decision.

BANTA DIVISION,
GEORGE BANTA COMPANY, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building, Suite 230, 744 North 4th Street, Milwaukee, WI 53203 (Tel. No. 414—291-3866).

APPENDIX C

Filed Oct. 13, 1982
George A. Fisher, Clerk
United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 81-1816 September Term, 1981

George Banta Company, Inc.,
Banta Division,
Petitioner

v.

National Labor Relations Board,
Respondent

Tri-Cities Local 382, Graphic Arts
International Union, AFL-CIO,
Intervenor

BEFORE: MacKinnon and Mikva, Circuit Judges; Cowen,*
Senior Judge, United States Court of Claims

ORDER

On consideration of petitioner's petition for rehearing, filed September 13, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

For The Court

GEORGE A. FISHER, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

* Sitting by designation pursuant to Title 28 U.S.C. § 293(a).

Filed Oct. 13, 1982
George A. Fisher, Clerk
United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 81-1816 September Term, 1982

George Banta Company, Inc.,
Banta Division,
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v.

National Labor Relations Board,
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International Union, AFL-CIO,
Intervenor

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

ORDER

Petitioner's suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For the Court

GEORGE A. FISHER, Clerk
By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Edwards did not participate in this order.

APPENDIX D

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

29 U.S.C. § 153

. . . .

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 158

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . .

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . . .

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

. . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutal obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . . .

. . . .

APPENDIX E

PREFERENTIAL REINSTATEMENT SYSTEM (88L)

Section A.1. Reinstatement to the Same or Substantially Equivalent Employment. An employee making an unconditional offer for reinstatement who has not engaged in misconduct sufficient to warrant discharge shall be reinstated in accordance with the following principles:

(a) An employee will be reinstated in the job classification he held when the strike began if that classification exists and if there is a vacancy in that classification. If a classification has been eliminated, an employee will be reinstated in the appropriate "successor" classification(s) as provided for in Attachment 1 hereto if there is a vacancy in said appropriate "successor" classification(s). If there is no vacancy in that classification, the employee will be reinstated in any substantially equivalent job classification for which he is qualified and in which a vacancy exists.

(b) If two or more employees make an unconditional offer for reinstatement at the same time and there are insufficient vacancies to allow immediate reinstatement of all of those employees in the job classification(s) held prior to the strike or the appropriate "successor" classification(s) or to substantially equivalent employment, preference will be granted in the following manner:

(i) An employee who previously held the classification (or appropriate "predecessor" classification) will be given preference for a vacancy in that classification based upon unit seniority; except in the Preparatory Department where preference for a vacancy in a journeyman classification shall be based upon classification seniority.

(ii) If none of the employees previously held the classification (or appropriate "predecessor" classification), unit seniority shall be the determining factor when, among employees involved, the qualifications for and ability to perform the work is relatively equal.

(iii) An employee in the Press Department shall be reinstated in an existing vacancy based upon unit seniority (by sheet or web department) except that no four-color pressman shall be "reinstated" to jogger.

Section A.2. Rights of Employees Not Offered Substantially Equivalent Employment. An employee who has made an unconditional offer for reinstatement who has not engaged in misconduct sufficient to warrant discharge who cannot be offered immediate reinstatement to his former position or appropriate "successor" classification or substantially equivalent employment, shall be treated in accordance with the following principles:

(a) Such an employee will be offered "reinstatement" in any job classification in which a vacancy exists provided the employee is qualified to perform all the duties of the classification(s) in question. Among two or more employees making an unconditional offer for reinstatement at the same time, preference will be given in offering "reinstatement" to available openings based upon unit seniority.

(b) Such an employee, including any employee "reinstated" pursuant to Section A.2(a), shall be placed on a preferential hiring list for all future vacancies constituting the same or substantially equivalent employment. An employee who desires a reinstatement shall be responsible for keeping his current address and telephone number on file with the Company. The Company may at reasonable intervals ask such employees placed on the Company's preferential hiring list whether they wish to retain their recall status.

(c) A chronological listing of employees who have made unconditional offers for reinstatement who could not be offered immediate reinstatement to their former positions or substantially equivalent employment shall be kept by the Company. Such chronological list shall be based upon the day and hour such unconditional offers are made by employees. This list shall include employees who have accepted offers by the Company for reinstatement to positions which are not substantially equivalent. Thereafter as vacancies occur or openings otherwise develop, employees shall be offered reinstatement to either their former positions or substantially equivalent employment in chronological order of their unconditional offers for reinstatement.

(d) Notwithstanding the above, a journeyman in the Preparatory Department who cannot be reinstated to a vacancy constituting the same or substantially equivalent employment shall have preference over general workers with respect to a vacancy in the general worker classification in the Preparatory Department. Among two or more such journeymen making an unconditional offer for reinstatement at the same time, preference will be given in offering "reinstatement" under this Section A.2(d) based upon unit seniority.

Section A.3. Rates of Pay for Reinstated Employees. Except as provided in Attachment 2 hereto, an employee reinstated pursuant to this Preferential Reinstatement System shall be paid the rate of the classification to which he is reinstated.

Section A. 4. Primacy of Preferential Reinstatement System. In the event of an express or implied conflict between the terms or operation of this Preferential Reinstatement System and the terms or operation of the parties' labor agreement, the Preferential Reinstatement System shall prevail. In this regard,

no employee reinstated pursuant to the terms of this Preferential Reinstatement System shall be entitled to exercise his seniority rights to displace another employee reinstated pursuant to the terms of this Preferential Reinstatement System from the position to which that (second) employee was reinstated.

Example: An employee is reinstated to substantially equivalent employment but not to his former classification. A vacancy develops in his former classification. Such an employee shall not be entitled to exercise his contractual seniority rights relative to that classification until the Company has exhausted its statutory obligations to offer substantially equivalent employment to employees who have not been restated to substantially equivalent employment.

Example: A vacancy which a reinstated employee is entitled to bid for pursuant to the terms of the labor agreement develops. Such an employee shall not be entitled to exercise his contractual seniority rights relative to such classification vacancy until the Company has exhausted its statutory obligation to offer substantially equivalent employment to employees who have not been reinstated to substantially equivalent employment.

Section A.5. Relation to the Grievance Procedure. Grievances relative to the interpretation or application of the terms of this Preferential Reinstatement System shall be subject to the grievance procedure set forth in the parties' labor agreement and handled and processed in the manner therein provided for except as provided for below:

(a) Grievances shall be filed and processed at the last step of the grievance procedure immediately prior to arbitration. The Company's written Answer shall be due fifteen (15) working days from receipt of the written grievance.

(b) Because this Preferential Reinstatement System treats with what are essentially the statutory rights of employees (as contrasted with the essentially contractual rights involved in the typical case submitted to arbitration), a dispute involving the interpretation or application of the terms of this Preferential Reinstatement System shall not be subject to arbitration except upon written mutual agreement of the parties.

Section A.6. Terms of this Preferential Reinstatement System. This Preferential Reinstatement System shall remain in full force and effect from October 10, 1977, to and including October 4, 1980. The expiration of this Preferential Reinstatement System shall not be construed as divesting any employee of any statutory right.

Accepted on behalf of the Union:

By _____

Dated: 12/1/77

Accepted on behalf of the Company:

By _____

Dated: 12/1/77

ATTACHMENTS

PRS (88L)

Attachment 1: Successor classifications are set forth in "*Plate Storage. Section PS.1.*"

Attachment 2: Employees reinstated pursuant to the PRS (88L) who, under the specified circumstances, are entitled to receive other than the rate of the classification to which they are reinstated are set forth in "*Plate Storage. Section PS.2*" and immediately below:

Any former Preparatory Department Journeyman reinstated in that Department as a General Worker:

Red Circle *7.07.*

PLATE STORAGE

Section PS.1. The job classification "Plate Storage" is eliminated. The duties previously performed by employees in said classification are henceforth assigned to the classification "Jogger," except film storage will be transferred to the Preparatory Department and those duties assigned to the classification "General Worker."

Section PS.2. The following individuals shall be paid at a "red-circled" hourly rate of $6.78 when classified "Jogger" so long as those individuals are classified as "Jogger," they shall receive no increase in their regular hourly rate by virtue of operation of the cost-of-living clause or general wage increase provision until such time as the regular hourly rate for all Joggers exceeds $6.78 (and, thereafter, there shall be a uniform classification rate):

FORMER PLATE STORAGE

		Rate when assigned to Specified Classification
TO JOGGER		RED CIRCLE *6.78*
Clarence Ertl	Thomas Matheny	
Thomas Porto	Keith Stuyvenberg	
David Voissem	James Heindl	
Charles Kluge	Peter Abendroth	
Harold Asmus		

Section PS.3. The above relates only to employees on the payroll on 4/4/77; those hired subsequent thereto shall be slotted in the classification Utility Worker and paid at the rate for that classification.

Section PS.4. In the event of an express or implied conflict between the terms or operations of these Plate Storage provisions and the terms or operations of any other provisions of the parties' labor agreement other than the Preferential Reinstatement System, these Plate Storage provisions shall prevail.

GRAPHIC
ARTS
INTERNATIONAL
UNION
Local 32S
52 Racine Street
Menasha, Wis. 54952

October 10, 1977

Mr. Donald S. Koskinen
Banta Division
Curtis Reed Plaza
Menasha, Wisconsin 54952

Dear Mr. Koskinen:

We have your letter of October 8, 1977. It was the intent of our letter of the same date to accept, and "we now reaffirm our acceptance of your total offer, including your Preferential Reinstatement System, to the full extent that the Preferential Reinstatement System does not violate the legal reinstatement rights of the striking employees. In our view, the law preserves the right to present to the NLRB any issue as to the legal reinstatement rights of the strikers. Accordingly, it is our view that a complete contract now exists between the company and each local union including agreement concerning union security, check off, and arbitration.

If it is the extent of your letter of October 8, 1977 to assert that it was a condition of your offer that there be a waiver of the right to present to the NLRB any question as to the legal reinstatement rights of the strikers which may not be essectuated by your proposed Preferential Reinstatement System, please advise us so that we may give further consideration to our position.

LEE SCHMELING
Lee Schmeling, PRESIDENT,
Local 32 B, Graphic Arts
International Union.

LEO C. O'CONNOR V.P.
Leo C. O'Connor, V.P.
Local 88L Graphic Arts
International Union

cc: John E Hue

E-9

BANTA DIVISION

George Banta Company, Inc.
MENASHA, WISCONSIN
414/722-7777

October 10, 1977

Mr. Robert W. Miller, President
and Mr. Leo O'Connor, Vice President
GAIU Local 88L
Menasha, WI 54952

Dear Gentlemen:

We are in receipt of your letter of October 10, 1977. It is our understanding that while you have accepted our total offer, you have reserved the right to challenge the legality of all or portions of the Preferential Reinstatement System. This is, of course your right, and we do not construe your acceptance of our total offer as a waiver of any rights under the NLRA except to the extent such rights are waivable and have been waived by the language of the Agreement.

Confirming our conversation of this date, you have proposed on behalf of your local union that the provisions in the contract providing for contract approval by the International be deleted. On behalf of the Company, we accept your proposal. Therefore, we have a contract and effective immediately will implement all of the provisions of our total offer, including union security, check off and arbitration.

We will arrange for formal execution in the immediate future.

Yours truly,

JOHN E. HUE

John E. Hue
Director of Industrial Relations

JEH/nh

APPENDIX F

RELEVANT EXCERPTS FROM THE TRANSCRIPT OF THE UNFAIR LABOR PRACTICE HEARING

(Tr. 702):

* * *

JUDGE ITKIN: I would like to ask one other question. I hope counsel don't mind me asking now, because we will be in recess for awhile after this hearing ends today.

Assuming this were an economic strike and not an unfair labor practice strike, what would be the position of the General Counsel with respect to those persons who had returned to work before the strike ended, vis-a-vis those persons who are applying to return to work at the end of the strike?

MR. LOOMIS: It would be General Counsel's position that the—if it were a straight economic strike, preferential reinstatement system signed by the unions would govern whatever rights employees have.

* * *

(Tr. 706):

* * *

MR. ALLISON: General Counsel hasn't taken a position as I understand it—a firm position, on the scope of violation if this were found to be an economic strike.

JUDGE ITKIN: Is that correct, Mr. Loomis?

MR. LOOMIS: Yes, General Counsel—Well, if it's a straight economic strike, General Counsel feels—And also leaving aside settlement problems—General Counsel would not be urging that the preferential reinstatement system signed by the union is unlawful.

* * *

(Tr. 714):

* * *

JUDGE ITKIN: Is it General Counsel's position that the PRS agreement or that there would be an 8(a)(3) pertaining to the PRS agreements if this is an economic strike?

MR. LOOMIS: No, Your Honor. Because the Union signed the agreement. If it was a straight economic strike.

* * *

(Tr. 720):

* * *

MR. ALLISON: Without unduly extending this colloquy, Your Honor, the Union's position is that this is the first time we've ever heard the Company take the position they've complied with any aspect of the settlement agreements. We don't believe it to be true. As a matter of fact. And the proof will show whether that's correct.

JUDGE ITKIN: I understand this is an issue.

MR. LOOMIS: Your Honor, I'd like to add one thing. I do not wish, General Counsel does not wish this to be viewed as a compliance proceeding, or quasi compliance proceeding.

* * *

(Tr. 1213-16):

* * *

JUDGE ITKIN: And the General Counsel's theory on this is that the employer violated section 8 (a) (3) of the Act by entering into the PRS? Or, by the method of selection of these employees? I want to make sure the theory is as accurately explained in the record as it can be.

MR. LOOMIS: It's General Counsel's theory. PRS as a document on its face does not violate Section 8(a)(3) of the Act. The preferential—If a reader picked up the document that's entitled "preferential reinstatement system", that document on its own would not violate Section 8 (a) (3) of the Act.

JUDGE ITKIN: Even if this were an unfair labor practice?

MR. LOOMIS: I believe so. It's the conjunction of the preferential reinstatement system and the crossovers that causes the violation.

JUDGE ITKIN: Your position, then, that even if I were to find that unfair labor practice strike, the PRS would not be unlawful on its face? It's only the manner of implimentation?

MR. LOOMIS: If PRS refers to the whole process, yes, then it's unlawful. But if it refers to the document, then I'm not saying—

JUDGE ITKIN: The document signed by the union and company?

MR. LOOMIS: The documents themselves we do not claim are violative of 8 (a) (3). The document itself.

JUDGE ITKIN: The method of implimentation?

MR. LOOMIS: Yes. Because of the conjunction of the crossovers and the preferential treatment given them under PRS, and the detriment under PRS that went to those who had stayed out on strike until its end.

JUDGE ITKIN: Thank you.

MR. RYBICKI: In order—May I make an observation on the record?

JUDGE ITKIN: Yes.

MR. RYBICKI: In order to clarify for my purposes, so I understand it as well.

It is my—It's my understanding, made upon representation, that General Counsel's position—And he can correct me if I'm wrong—that if everybody had returned at precisely the same time and no crossovers—I'm sorry—no crossovers and everybody had made an offer to return to work at the time the union made the general offer on behalf of its membership for reinstatement, had that been applied under those circumstances, the PRS would not have been lawful. But because there were strikers who had previously offered to return to work and who had been reinstated, whom the company declined to displace, that action is illegal, because it discriminates against them with respect to rates of pay, job assignments, etc. Is that—Did I correctly understand that?

MR. LOOMIS: I think you used one word that's going to come out wrong in the record. You used the word "unlawful" "lawful"—I don't remember. But, in any event—

JUDGE ITKIN: If I can just take you one step further before I—we move on.

I must, therefore, determine the nature of the strike to determine whether or not the implimentation of the PRS with respect to crossovers is a violation of Section 8 (a) (3)?

MR. LOOMIS: That is correct, Your Honor.

JUDGE ITKIN: Because if it's not an unfair labor practice strike, the implimentation in such a manner to favor, as you allege, crossovers, would not be a violation?

MR. ALLISON: May I speak to all this?

MR. RYBICKI: Excuse me. That's my understanding that General Counsel has represented before. That if it's an economic strike, it's lawful.

MR. LOOMIS: General Counsel has contended and certainly hope will contend, that there is only a violation of Section 8 (a) (3) with respect to the operation of the preferential reinstatement system if there was an unfair labor practice strike.

* * *

(Tr. 1520):

* * *

JUDGE ITKIN: It is your position as representative of the General Counsel that the PRS system would neither be discriminatory nor inherently discriminatory as the case may be if this were an economic strike?

MR. LOOMIS: Yes, Your Honor. That's correct.

MR. ALLISON: Our position is on the record.

JUDGE ITKIN: Yes it is.

MR. LOOMIS: But I wanted to address myself to this because there is some—there is some question about the document labeled the Preferential Reinstatement System. We are attacking the system by whatever document you want to call it or give it a name, whatever. It is the method, the system we are attacking and I want that to be clarified on the record.

JUDGE ITKIN: I only want the record to be very clear at this point, if there was any ambiguity, the General Counsel in effect acknowledges now as he has acknowledged earlier according to my notes that if this strike were found to be an economic strike and not an unfair labor practice strike, the PRS agreement as implemented would not be violative of Section 8(a)(3) of the Act.

MR. LOOMIS: That's correct.

(Tr. 1870):

* * *

JUDGE ITKIN: I do note, however, that it is General Counsel's position that there was—there would be a waiver if this were not an unfair labor practice strike; is that correct?

MR. LOOMIS: I don't like to use the word waiver, Your Honor. If this were an economic strike, the preferential reinstatement system, we would not be alleging the preferential reinstatement system violated Section 8(a)(3).

JUDGE ITKIN: Thank you.

MR. LOOMIS: That's all I'm saying.

JUDGE ITKIN: All right. I note that position. In any event, I will receive these exhibits to assist us in understanding that preferential reinstatement system or the sequence of events that led up to its execution, although I am mindful that General Counsel as he has acknowledged contends that this system would be valid and controlling here if this were not an unfair labor practice strike; is that correct?

MR. LOOMIS: We are not attacking the validity of the preferential reinstatement system if it's found to have been an economic strike. I prefer to phrase it in those terms rather than—

(Tr. 1870).

No. 82-1162

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE BANTA COMPANY, INC., BANTA DIVISION,
PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
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WILLIAM A. LUBBERS
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LINDA SHER
Assistant General Counsel

COLLIS SUZANNE STOCKING
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner discriminated against returning strikers on the basis of their continuing participation in a strike.

2. Whether substantial evidence supports the Board's finding that the Union did not waive any reinstatement rights accorded to employees by the National Labor Relations Act.

3. Whether the Board's proceedings denied petitioner due process of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-1 to A-28) is reported at 686 F.2d 10. The Board's decision and its order (Pet. App. B-1 to B-102) are reported at 256 N.L.R.B. 1197.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1982. A petition for rehearing was denied on October 13, 1982 (Pet. App. C-1 to C-2). The petition for a writ of certiorari was filed on January 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As of early 1977, the respondent Union[1] represented bindery and warehouse employees in two of petitioner's facilities (Pet. App. B-5, B-10). On April 4, 1977, the parties having failed to reach agreement on a new contract, petitioner announced that it was implementing its last contract offers. All of the employees represented by the Union thereupon went out on strike (Pet. App. B-5 to B-6, B-52).

The Union filed unfair labor practice charges with the Board alleging that petitioner had implemented its last contract offer in the absence of a bargaining impasse, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). A complaint was issued by the General Counsel alleging that petitioner had violated the Act as charged and that the ensuing strike was an unfair labor practice strike. A hearing was set for July 1977 and the Board determined to seek injunctive relief from a district court, under Section 10(j) of the Act, 29 U.S.C. 160(j) (Pet. App. B-6).

The hearing on the complaint was not held, and injunctive relief was not sought, however. Instead, on July 22, 1977, petitioner signed a formal Settlement Stipulation agreeing to revoke implementation of its last contract offers and, upon the making of unconditional offers to return to work by striking employees, to offer those employees immediate and full reinstatement to their former positions or to substantially equivalent positions without prejudice to their seniority or other rights or privileges, discharging, if necessary, any new employees hired after April 4, 1977.

---

[1]Until March 1978, petitioner's employees were represented by two locals of the Graphic Arts International Union — Locals 32-B and 88-L. The two locals merged at that time to form Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO (Pet. App. B-5; A-2). They are all referred to here as "the Union."

Under the stipulation, if insufficient jobs were available to effect the reinstatement of all strikers, those who could not be reinstated were to be placed on a preferential hiring list according to their seniority and given offers of reinstatement as jobs became available (Pet. App. A-3; B-6, B-53, B-73, B-74). On September 22, 1977, the General Counsel signed this Settlement Stipulation and forwarded it to the Board for approval (Pet. App. A-3; B-53, B-76).

Between September 13 and October 4, 72 strikers resigned from the Union and abandoned the strike (Pet. App. B-53, B-76). On October 4, the parties returned to the bargaining table where petitioner presented its contract proposals. Petitioner also distributed to the Union, for the first time, copies of a "preferential reinstatement system" which it had drawn up. Petitioner proposed that the preferential reinstatement plan govern the return of employees at the strike's end (Pet. App. B-54, B-76).

The Union objected to petitioner's reinstatement plan, arguing that employees should be reinstated after the strike on the basis of their unit seniority (Pet. App. B-56 to B-58). On October 6, petitioner again submitted a contract proposal and its reinstatement plan, labeling this submission its "absolute last and final" offer (Pet. App. B-58). The Union repeated that the contract was unacceptable, and petitioner's officials left the meeting (*ibid.*).

On October 8, the Union's members voted to authorize the Union to make an unconditional offer to return to work on their behalf, to accept petitioner's contract proposals, and to inform petitioner that they considered its reinstatement plan contrary to their rights under the Act (Pet. App. B-59 to B-60). That same day, the Union signed the Settlement Stipulation previously executed by petitioner and the General Counsel in connection with the unfair labor practice charges filed against petitioner the preceding April (Pet.

App. B-60). The Union immediately notified the Company that it had joined in the Settlement Stipulation, that the strike was over, and that it was making an unconditional offer to return to work on behalf of all employees represented by the Union. Finally, the Union informed petitioner that its members had accepted petitioner's final contract offers, but that (Pet. App. A-4; B-60):

> We do not agree with the Company's interpretation of the statutory rights of returning employees, as set forth in the [Company's reinstatement plan]. We will rely on the statutory rights of reinstatement as provided by the NLRA and the Settlement Stipulation described above, and, of course, we do not waive any of those rights.

Petitioner accepted the Union's unconditional offer to return to work, but stated that its preferential reinstatement plan (*ibid.*):

> was and is an integral part of our October 6, 1977, offer. Since you have not accepted our total offer, there is no contract * * *. Construing your letter as a counter proposal, we reject it for reasons previously advanced.

Two days later, the Union reaffirmed its intention to accept the "total offer, including your [preferential reinstatement plan] to the full extent that the [plan] does not violate the legal reinstatement rights of the striking employees" (Pet. App. A-4). The Union added (*id.* at A-5):

> If it is the entent [sic] of your letter of October 8, 1977 to assert that it was a condition of your offer that there be a waiver of the right to present to the NLRB any question as to the legal reinstatement rights of the strikers which may not be essectuated [sic] by your proposed [reinstatement plan], please advise us so that we may give further consideration to our position.

Petitioner responded (Pet. App. A-5; B-60):

> It is our understanding that while you have accepted our total offer, you have reserved the right to challenge the legality of all or portions of the [preferential reinstatement plan]. This is, of course, your right and we do not construe your acceptance of our total offer as a waiver of any rights under the [Act] except to the extent such rights are waivable and have been waived by the language of the Agreement.

No permanent replacements had been hired during the strike; and at the end of the strike all temporary replacements were terminated (Pet. App. B-52 to B-53, B-76). At the end of the strike, petitioner assigned each employee who had abandoned the Union and had crossed or offered to cross the picket line before the strike's end to the job classification and wage rate that employee had held prior to the strike, without regard to its production needs or the work, if any, actually performed by that employee during the strike. Petitioner then recalled some full-term strikers to the jobs remaining after all of the "cross-overs" had been placed in their pre-strike positions. Those positions, which petitioner deemed "vacant," were generally lower paying ones (Pet. App. A-15 to A-16; B-63 to B-67, B-77 to B-78).

In addition petitioner immediately granted all cross-overs their pre-strike pay rates on a "permanent" basis and granted them full contractual rate-retention rights so that they were paid at their pre-strike rates even while performing tasks ordinarily assigned a lower rate. Meanwhile, full-term strikers attempting to work their way back up to their pre-strike positions were required to satisfy tests of "permanency" at each step of the progression before gaining rate-retention at that step (Pet. App. B-67 to B-68, B-70 to B-73, B-78). Cross-overs were absolutely insulated for three years from "bumping" or displacement by full-term strikers, while full-term strikers with machine or job seniority

rights superior to those of cross-overs were precluded, even after being recalled, from exercising those rights to regain their positions in the active workforce (Pet. App. B-67, B-70 n.34, B-77, B-78).

2. On October 20, 1977, the Union filed a second set of unfair labor practice charges against petitioner alleging that the preferential reinstatement plan as implemented violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3). The Union also alleged that the reinstatement plan as implemented violated the terms of the Settlement Stipulation (Pet. App. A-5; B-7, B-9). Five days after these charges were filed, petitioner notified the Board that it was withdrawing from the Settlement Stipulation. This matter was litigated in separate proceedings. It was ultimately determined that petitioner had no right to withdraw from the stipulation settling the first round of unfair labor practice charges (Pet. App. A-5 to A-6; B-7 to B-8).[2]

In April 1978, a complaint premised on the Union's second set of unfair labor practice charges issued, alleging that petitioner had violated Section 8(a)(1) and (3) of the Act by granting preferential reinstatement rights or preferential seniority rights to jobs and rates of pay to those employees who abandoned the strike before its end, and by denying seniority and the benefits of seniority for purposes of job assignment and rates of pay to those employees who

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[2]On July 14, 1978, the Board entered an order enforcing the terms of the settlement. Petitioner appealed to the Court of Appeals for the Fourth Circuit, which in August 1979 issued a decision enforcing the Board's order. *George Banta Co.* v. *NLRB*, 604 F.2d 830 (1979), cert. denied, 445 U.S. 927 (1980) (hereinafter "*Banta I* "). The Fourth Circuit held that petitioner could not unilaterally withdraw from the Settlement Stipulation and that by the terms of that agreement, petitioner had bound itself to accord the strikers reinstatement rights "coincid[ing] precisely with those of unfair labor practice strikers" (604 F.2d at 832; footnote omitted). See Pet. App. A-6, A-14; B-6 to B-9.

remained on strike until the strike was abandoned by the Union (Pet. App. A-7, A-21 to A-22; B-9 to B-10).

At the hearing on this complaint, counsel for the General Counsel argued that petitioner's preferential reinstatement plan was unlawful under the Act only if the strike had concerned unfair labor practices (Pet. App. A-7 to A-8, A-19 to A-21; B-80). During the course of the hearing, however, the Administrative Law Judge ruled preliminarily that because the Settlement Stipulation (the Board's approval of which petitioner was seeking to overturn (see page 6 note 2, *supra*) set forth the striker's reinstatement rights, it was unnecessary to determine whether the strike had been an economic or an unfair labor practice strike (Pet. App. A-8; B-8 to B-9). The Board affirmed the ALJ's ruling that the Settlement was dispositive of the issue whether the strikers were entitled to the reinstatement rights of unfair labor practice strikers. However, in light of the possibility, cited by the General Counsel, that the Settlement might be overturned by the Court of Appeals for the Fourth Circuit, the Board directed that the ALJ entertain background testimony concerning the nature of the strike (Pet. App. A-8; B-9).

In October 1978, the ALJ rendered a decision finding petitioner's reinstatement plan as implemented "inherently discriminatory and unlawful" under the Act, regardless of the validity of the Settlement or whether the strike was premised on economic or unfair labor practice issues (Pet. App. B-78 to B-80). The ALJ ruled further that, even if the legality of petitioner's reinstatement procedures depended on whether the strike had been economic or caused by unfair labor practices, the Settlement gave its employees the reinstatement rights of unfair labor practice strikers (*id.* at B-52, B-74 n.36). Finally, the ALJ found that a bargaining impasse had existed on April 4, 1977; and therefore the strike was economic (*id.* at B-51 to B-52).

While the ALJ's decision in this matter was pending Board review, the Fourth Circuit issued its opinion in *Banta I* (see page 6 note 2, *supra*), holding that petitioner remained bound by the Settlement Stipulation under which it had agreed to reinstate all strikers according to their seniority, discharging any replacements if necessary to effect reinstatement of the strikers. Subsequently, the Board issued its decision and order in the instant proceeding, upholding the ALJ's rulings except for his finding concerning the nature of the strike. The Board found it unnecessary to reach that issue because *Banta I* had by then established the strikers' entitlement under the Settlement Stipulation to reinstatement in the manner accorded by law to unfair labor practice strikers (Pet. App. B-2 n.4).

3. The court of appeals enforced the Board's order in full, finding that substantial evidence on the record as a whole supported the Board's finding that petitioner unlawfully discriminated in favor of those employees who abandoned the strike by granting them preferential reinstatement and seniority rights without regard to petitioner's production requirements or the work, if any, those employees performed during the strike; and unlawfully discriminated against those employees who stayed out on strike by assigning them inferior jobs, wages and other benefits solely because they did not offer to return to work before the strike's end (Pet. App. A-15 to A-16). The court found petitioner's conduct unlawful on two grounds: first, because it denied its employees the post-strike reinstatement rights set forth in the Settlement Stipulation and, alternatively, because it violated the employee's statutory reinstatement rights under the rationale of *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).

In affirming the Board's decision, the court rejected petitioner's claim that the Union had clearly and unmistakably waived the striker's reinstatement rights, finding nothing in

the language of the parties' contract indicating such waiver and finding, further, that the parties' negotiations concerning petitioner's preferential reinstatement system reflected an express refusal of the Union to waive those rights (Pet. App. A-18 to A-19). The court also found that, contrary to petitioner's contentions, the violation found was within the scope of the underlying complaint as issued by the General Counsel, that all pertinent issues had been fully and fairly litigated, and that petitioner suffered no prejudice from counsel for the General Counsel's statement at the hearing before the ALJ that petitioner's reinstatement procedures were unlawful only if the strike was an unfair labor practice strike (Pet. App. A-19 to A-27).

ARGUMENT

Petitioner contends that the decision of the court of appeals conflicts with established precedent respecting an employer's right to hire permanent replacements during an economic strike (Pet. 13-18); that the court erroneously failed to find that the Union's signing of its PRS document constituted a "clear and unmistakable waiver" of the striker's statutory rights to nondiscriminatory reinstatement (Pet. 18-23); and that the court improperly held that unfair labor practice liability can be predicated on an allegation that was outside the scope of the General Counsel's underlying complaint and that was not litigated at the hearing (Pet. 8-13). Petitioner's contentions lack merit and do not warrant review by this Court.

1. It is settled that both economic and unfair labor practice strikers retain their status as "employees" under the Act,[3] and thus are entitled to immediate full reinstatement

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[3]Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3) defines "employee" to include "* * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *."

to their former positions without prejudice to their seniority or other employment rights at the conclusion of their strike activity. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). An employer who denies such reinstatement violates Section 8(a)(3) and (1) of the Act unless he "can show that his action was due to 'legitimate and substantial business justifications.' " *NLRB* v. *Fleetwood Trailer Co., supra*, 389 U.S. at 378, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

The statutory reinstatement rights of economic and unfair labor practice strikers are identical except that only during an economic strike may an employer hire permanent replacement employees whom he need not displace in order to accommodate strikers who seek reinstatement. *NLRB* v. *Fleetwood Trailer Co., supra*, 389 U.S. at 379; *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). This is so because the "need of the employer to assure permanent employment to the replacements so that the necessary labor force can be obtained to maintain operations during a strike" provides the " 'legitimate and substantial business justification' for requiring replaced economic strikers to wait for reinstatement until a vacancy occurs in the labor force." *Laidlaw Corp.* v. *NLRB, supra*, 414 F.2d at 105, quoting *NLRB* v. *Fleetwood Trailer Co., supra*, 389 U.S. at 379.

However, even during a purely economic strike, an employer cannot burden the statutory right to strike by according those who work during a strike a post-strike advantage over those who exercise their right to strike. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 223, 236-237 (1963) (an employer cannot lawfully grant replacements or nonstriking employees fictional seniority rights calculated to protect them from, and subject the strikers to, future

layoffs or terminations).[4] A discriminatory grant of post-strike employment rights divides the employees to the permanent disadvantage of former strikers and therefore is so "inherently destructive" of the right to strike as to be unlawful without the need of further inquiry into the employers' motivation. *Id.* at 231, 236-237; *NLRB* v. *Great Dane Trailers, Inc., supra,* 388 U.S. at 34.

Petitioner essentially contends (Pet. 13-18) that, because the strike was an economic strike, the cross-overs had, in effect, the same rights as permanent replacements and that the court of appeals' failure to accord them that status conflicts with the treatment allowed permanent replacements in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938) and *Giddings & Lewis, Inc.* v. *NLRB,* 675 F.2d 926 (7th Cir. 1982). However, both the Board and the court of appeals found that, even if the strike were economic, petitioner had, in the settlement agreement, undertaken to accord the strikers the right of unfair labor practice strikers who would be entitled to return to their jobs even if they were permanently replaced. To the extent that petitioner quarrels with that finding, it raises a fact-bound issue which does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951).

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[4]See also, *e.g., Rogers Manufacturing Co.* v. *NLRB,* 486 F.2d 644, 646-648 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974) (employer's refusal to accord employees seeking reinstatement full credit for their previously accrued seniority incompatible with right to strike); *Great Lakes Carbon Corp.* v. *NLRB,* 360 F.2d 19, 20-21 (4th Cir. 1966) (destructive of right to strike for employer to grant employees who abandon a strike preference with respect to protection from layoffs, shifts, and other employment rights); *Swarco, Inc.* v. *NLRB,* 303 F.2d 668, 670-673 (6th Cir. 1962), cert. denied, 373 U.S. 931 (1963) (destructive of right to strike for employer to promise pre-strike employees who abandon a strike immunity from "bumping" by later returning strikers with greater seniority).

Moreover, the court of appeals upheld the Board's finding that petitioner's post-strike reinstatement procedures afforded cross-overs significant advantages going beyond the guarantee of permanent tenure for permanent replacements approved in *NLRB* v. *Mackay Radio & Telegraph Co., supra,* and *Giddings & Lewis, Inc.* v. *NLRB, supra.* The Board found, and the court of appeals agreed, that petitioner granted post-strike preferential reinstatement and seniority rights to employees who abandoned the strike prior to its end — regardless of its production requirements or the work actually performed by the employees during or after the strike — and denied these rights to full-term strikers so that "a difference of a few hours caused by whether an employee offered to return to work before or after the strike's end had significant repercussions to the employee's wage rate and other benefits" (Pet. App. A-15 to A-16 (footnote omitted); B-63 to B-70, B-81).[5] Such discrimination plainly is prohibited by *NLRB* v. *Erie Resistor Corp., supra.*

2. Petitioner does not challenge the settled principle, applied by the Board and the court of appeals (Pet. App. A-19; B-79 to B-80), that a waiver of statutory rights must be demonstrated by "an express statement in the contract to that effect," *Drake Bakeries, Inc.* v. *Local 50, Bakery &*

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[5]Moreover, petitioner can lay no colorable claim to the business justification upon which an employer's right to hire permanent replacements is founded — that is, the need for the employer to assure permanent employment to the replacements so that the necessary labor force can be obtained to maintain operations during a strike. Here, the Board's finding, sustained by the court of appeals, was that petitioner's post-strike "permanent" reinstatement of the cross-overs to their former positions, and its "temporary" reinstatement of full-term strikers to lower positions, were made on the basis of the employee's strike activity, without regard to petitioner's production needs or the work any employee actually performed during or after the strike (Pet. App. B-78 to B-79).

Confectionary Workers, 370 U.S. 254, 265 (1962). Yet petitioner has not at any stage of these proceedings identified any such language in its agreement with the Union. Of course, neither the Board nor the court below found such a waiver.[6] Here, as below, the only language petitioner points to (Pet. 21) is its own statement (see page 5, *supra*) that it did not construe the Union's acceptance of its total package as a waiver of the employees' reinstatement rights under the Act "except to the extent that such rights are waivable and have been waived by the language of the agreement." The court of appeals noted that the Union responded to petitioner's representations with an explicit statement that it would rely on the statutory rights of the strikers, as well as their rights under the Settlement Stipulation, and that it had refused to waive any of those rights (Pet. App. A-19). The court found that the course of the parties' dealings leading to settlement of the strike compelled the conclusion that "the parties had agreed to disagree about the legality of the [preferential reinstatement system] and the issue would be resolved in a subsequent challenge by the Union" (Pet. App. A-19). The court thus found that the parties' agreement "provides absolutely no support for the suggestion that a clear and unmistakable waiver of statutory rights took place here" (*ibid.*). Petitioner's fact-bound challenge to this finding warrants no further review.[7]

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[6]Petitioner's assertion (Pet. 18-22) that its written reinstatement plan "set[] forth the reinstatement rights of strikers in clear and unambiguous terms" is groundless. That document (Pet. App. E-1 to E-9) is entirely silent concerning "rate-retention" rights, the definition of "available" work, "temporary" as opposed to "permanent" reinstatement to particular positions, and the other factors that petitioner manipulated so as to discriminate against full-term strikers.

[7]Petitioner contends (Pet. 22) that a similar issue is presented in *Metropolitan Edison Co.* v. *NLRB*, No. 81-1664 (argued Jan. 11, 1983). But the issue there is whether a general no-strike clause and arbitral interpretations thereof could be deemed to constitute a clear

3. Petitioner claims finally (Pet. 8-13) that its due process rights have been infringed because counsel for the General Counsel asserted at the hearing that the legality of petitioner's reinstatement system depended on whether the strike concerned unfair labor practices. This contention is meritless. Contrary to petitioner's contention, this case does not present any issue concerning the General Counsel's prosecutorial authority to decide whether to issue, or to prosecute, or to reject an amendment to, an unfair labor practice complaint. The court below accepted as "axiomatic" the proposition that the " 'Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing' " (Pet. App. A-12 to A-13, quoting *NLRB* v. *Blake Construction Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981)). The issue in this case is whether the Board has the authority "to determine which issues *are* within the scope of a complaint" (Pet. App. A-25 n.17), and to decide those issues. The court below held that the Board does have such authority, and petitioner cites no case casting doubt on that proposition.[8]

Moreover, the court below carefully examined the manner in which the Board exercised that authority in this case and found no impropriety. Thus, the court examined the language of the complaint and concluded that "the violation found in this proceeding was the violation alleged in the

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and unmistakable waiver of the right of employees holding union office not to be subject to harsher discipline than other employees for participation in contractually prohibited work stoppages. There accordingly is no occasion to hold this case for disposition in light of No. 81-1664.

[8]To the contrary, petitioner relies (Pet. 11) on *Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1040-1041 (8th Cir. 1976), in which the court expressly reaffirmed the holding of *Laclede Gas Co.* v. *NLRB*, 421 F.2d 610, 616-617 & n.16 (8th Cir. 1970), that where the allegations of a Complaint are "arguably broad enough" to encompass an issue, the Board may, in its discretion, decide that issue "with or without the consent of the General Counsel."

Complaint" (Pet. App. A-21), and there was nothing in the complaint itself to suggest that the legality of the conduct therein alleged to violate the Act depended on whether the strike concerned economic or unfair labor practice issues (*id.* at A-22).

To be sure, as the court noted (Pet. App. A-22), counsel for the General Counsel asserted to the ALJ that petitioner's implementation of its preferential reinstatement system violated the Act only if the strike was an unfair labor practice strike. However, the court also observed (Pet. App. A-22 to A-23) that petitioner has "not suggested any claims or evidence that it would have presented" but for the General Counsel's assertion that the strike concerned unfair labor practices; that the Union appeared as a party to the hearing and argued throughout that the conduct specified by the General Counsel in the complaint violated the Act regardless of the nature of the strike and thereby put petitioner on notice that it would have to address this contention;[9] and that "[a]ll pertinent issues and allegations were exhaustively litigated at the hearing — the method and times of employee reinstatement under the PRS, the consequences for seniority and wage rates, and [petitioner's] purported defenses of waiver and business justification." In short, the court properly determined that petitioner was not denied procedural due process, finding, instead, that petitioner understood the issues in this case "and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory" (*NLRB* v. *Mackay Radio & Telegraph Co., supra,* 304 U.S. at 350).

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[9]Although counsel for the General Counsel did not adopt this line of argument at the hearing, he never objected to the Union's assertion of its alternative position or sought to amend the complaint to preclude this argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board

MARCH 1983

DOJ-1983-03

No. 82-1162

In The

Supreme Court of the United States

October Term, 1982

GEORGE BANTA COMPANY, INC.,
BANTA DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
and
TRI-CITIES LOCAL 382,
GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO,

Respondents.

BRIEF OF RESPONDENT TRI-CITIES LOCAL 382, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT TRI-CITIES LOCAL 382, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO, urges the Court to deny the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit. Contrary to Petitioner's claims, the decision below follows the prior decisions of this Court, creates no conflict among the circuits, and raises no question of law to be resolved by this Court.

STATEMENT OF THE CASE

Petitioner George Banta Company, Inc. (hereafter referred to as "the Company"), is a printer, located in Menasha,

Wisconsin. The Company's bindery and lithographic employees have for many years been represented by Locals 32-B and 88-L of the Graphic Arts International Union, AFL-CIO, since merged to form Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO (hereafter referred to as "the Union").

The 1974-1977 collective bargaining agreements between the Company and Locals 32-B and 88-L expired on April 3, 1977. The parties were in the middle of negotiations on April 3, 1977; as soon as the contracts expired, the Company unilaterally implemented its last contract offers. All of the employees struck in response, and their strike lasted from April 4 to October 8, 1977. The Union filed unfair labor practice charges on April 13, 1977, and the General Counsel to the National Labor Relations Board issued a complaint alleging that the Company's unilateral action was illegal and that the employees' strike was an unfair labor practice strike.

This complaint was subsequently settled by a formal Settlement Stipulation between the Company, the Union, and the General Counsel, in which the Company agreed to rescind its unilateral action and agreed to the entry of a Board order establishing that the striking employees had reinstatement rights equivalent to those of unfair labor practice strikers.

In October, 1977 negotiations ending the strike, the Company insisted on a "preferential reinstatement system" which would give employees who had abandoned the strike an absolute preference in recall to their pre-strike jobs, and would systematically discriminate between strikers and non-strikers in seniority rights, job assignments, and wages. When the Company refused to implement the agreed-upon labor contracts without these discriminatory policies, which it stated it intended to implement in any event, the Unions signed the "preferential reinstatement system" under

protest, as a separate document and with an express reservation of their rights to challenge it as violating their members' rights under the Act and the Settlement Stipulation. (Appendix B, pp. 60, 79-80; Appendix E, pp. 8-9).

After the strike, the Company immediately began a program of systematic discrimination among employees in recall to work, job assignments, and recognition of contractual rights, based solely on whether or not the employees had crossed the picket line. The Unions filed new unfair labor practice charges concerning this post-strike discrimination. In response to the Unions' charges, the Company attempted to "withdraw" from the formal Board settlement of the earlier complaint against it, notwithstanding that the settlement had been signed by all parties, and the Company's settlement commitments had been explicitly relied upon by the General Counsel in terminating injunction proceedings against the Company, and by the Union and the employees in terminating their strike. (Appendix A, pp. 5-6; G.C. Exh. 12).

The Company's Post-Strike Conduct

Nowhere in its petition does the Company discuss the post-strike conduct which the Board found to be "more pervasive than the plan condemned in *Erie Resistor*" (Appendix B, p. 75), and to constitute "widespread and egregious" violations of the Act (Appendix B, p. 94). The Board's factual findings of systematic discrimination against former strikers, and in favor of those employees who resigned from the Union and crossed the picket line ("cross-overs" or, as the Company chose to call them, "white hats"—Tr. 127, 344, 390) were not contested before the Court of Appeals, nor are they here:

Discrimination in Initial Recall. The Company systematically insulated all cross-overs from the competition for available post-strike jobs, rather than following the contractual requirement of non-discriminatorily allocating jobs by seniority. (See Appendix B, pp. 65-67, 76-78). This absolute preference to "cross-overs" in reinstatement, like the other

discriminatory practices, was found to be totally unrelated to any production requirements or other business justification. (See Appendix B, p. 79).

Post-Recall Discrimination in Recognition of Seniority. Even after their discriminatorily delayed recall to the plant, former strikers continued to be systematically discriminated against in job assignments. Strikers' seniority was ignored in favor of cross-overs with less seniority. All cross-overs were reinstated to their pre-strike jobs, regardless of the work available, or what they actually did during the strike; returning strikers were assigned to only the remaining jobs. (See Appendix B, pp. 66-67, 71-72, 77-78). This post-reinstatement discrimination was pervasive and continuing: *one year after the end of the strike*, 153 senior bindery employees, 127 senior pressroom employees, and 45 of the 58 preparatory employees, all of whom were strikers, were still working at lower paying jobs below cross-overs with less seniority (G.C. Exhs. 54(b), 55(c), 56(b)).

Post-Recall Discrimination in Recognition of Machine Seniority. Under the parties' contract, preference among machine operators is determined by their relative "machine seniority." Even after recall, the Company refused to recognize former strikers' machine seniority vis-a-vis cross-overs, some of whom had no seniority at all on the equipment to which they were assigned. (See Appendix B, p. 70, n.34, p. 78).[1]

Post-Recall Discrimination in Recognition of Rate Retention. By contract, employees retain their full contract rate when assigned to other jobs. All cross-overs received full rate retention at pre-strike rates, even if they had not yet returned to operate their pre-strike equipment. Most returning strikers did not have their rate retention rights

[1] In Appendix B to its petition, the Company has renumbered the footnotes in the Administrative Law Judge's Decision. Reference is made here to the footnotes as numbered in Appendix B, not as in the original or published Decision.

recognized, even if they were performing their pre-strike jobs on a full-time basis. (See Appendix B, pp. 67-68, 72, 78).

Post-Recall Discrimination in the Application of Permanency Requirements. The Company required returning strikers to re-qualify for their pre-strike rate of pay under contractual standards of permanency normally applied only to new employees. None of the cross-overs was required to satisfy this requirement. (See Appendix B, pp. 68, 78).

Post-Recall Discrimination in the Recognition of "Displaced Persons" Status. The Local 32-B contract provided full rate retention for "displaced persons," that is, employees whose machines or jobs had been eliminated. The Company recognized contractual displaced persons status for cross-overs, and refused to recognize it for any former striker. (See Appendix B, pp. 68-70, 72-73, 78).

The Complaint and Hearing

On March 8, 1978, the General Counsel issued the complaint against the Company in this case. The allegations of massive post-strike discrimination were made without reference to the nature of the strike or the ultimate disposition of the challenged Settlement Stipulation.[2] Hearing on these allegations was held before Administrative Law Judge

[2] After complaint had issued, on July 14, 1978, the Board ruled that the Company could not withdraw from the Settlement Stipulation, and entered the Order to which the parties had agreed, confirming, among other things, the strikers' status for purposes of reinstatement. *George Banta Company, Inc., Banta Division*, 236 NLRB 1559. The Company immediately appealed to the United States Court of Appeals for the Fourth Circuit, and continued to argue that it was not bound by the settlement. The Company's appeal was still pending when hearing in this case opened before Administrative Law Judge Itkin on August 21, 1978.

Frank H. Itkin on 17 days between August 21 and November 7, 1978.[3]

Administrative Law Judge Itkin's Decision

On October 15, 1979, Administrative Law Judge Itkin issued his 76-page decision. Judge Itkin found the Company's post-strike discrimination to be illegal as alleged on two alternative theories:[4]

1. First, Judge Itkin found that the Company's post-strike reinstatement practices were "inherently discriminatory and unlawful," without reference to the Settlement Agreement and regardless of whether the strikers were considered to be economic strikers or unfair labor practice strikers (Appendix B, pp. 80-81).

2. Alternatively, Judge Itkin found that even if the legality of the Company's post-strike conduct were found to depend on the strikers' legal status, their rights to reinstatement as unfair labor practice strikers had been established by the Board Order incorporating the agreed-upon Settlement Stipulation (Appendix B, pp. 52, 74, n.36).

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[3]On August 6, 1979, while the matter was pending before Judge Itkin for decision, the United States Court of Appeals for the Fourth Circuit issued its decision in *George Banta Co., Inc., Banta Division* v. *N.L.R.B.*, 604 F.2d 830 (4th Cir. 1979), denying the Company's attempt to renege on its settlement commitments and enforcing the agreed-upon Board order. The Company immediately petitioned for a rehearing and later petitioned the United States Supreme Court to issue a writ of certiorari, both of which petitions were denied. 445 U.S. 927 (1980).

[4]Other parts of Judge Itkin's Decision, not relevant here, involved findings concerning the Company's unilateral action of April, 1977, which the Board had ordered the Judge to make in the event the Company was successful in its continuing challenge to the Settlement Stipulation in the Fourth Circuit; and findings with respect to the discharge of six strikers for alleged misconduct.

The National Labor Relations Board's Decision

On July 16, 1981, a unanimous panel of the National Labor Relations Board affirmed the rulings, findings, and conclusions of Administrative Law Judge Itkin and adopted his recommended order without modification. The Board's only abstention from the Judge's decision is in footnote 4 to its decision where the Board finds it unnecessary to decide whether bargaining impasse had occurred in April, 1977 or whether the strike was an economic or an unfair practice strike since—as the Judge had ruled—the strikers' reinstatement rights had been determined by the Board Order in *George Banta Company, Inc., Banta Division*, 236 NLRB 1559 (1978), enforced, 604 F.2d 830 (4th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). (Appendix B, p. 2, n.4). The Board *did* not exempt from its blanket affirmance of the Judge's decision his findings and conclusions that the Company's reinstatement policies were illegal under *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), without regard to the status of the strikers.

The Board adopted, without exception, the central holding of Administrative Law Judge Itkin (Appendix B, p. 78):

> In sum, the Employer's reinstatement plan, as implemented, awarded substantial priority to the "cross-overs." Strikers were only recalled to remaining jobs. "Cross-overs" were reinstated to pre-strike positions and returning strikers at the strike's end were in significant part recalled to lower-rated positions. "Cross-overs" retained and received full contractual rate-retention rights to their pre-strike jobs; however, returning strikers were often required to meet tests of permanency in order to have rate-retention status to various higher-rated jobs. Returning strikers were similarly denied displaced persons and machine seniority rights by operation of this plan.
>
> A reinstatement plan predicated so heavily upon a distinction between employees who abandoned the strike

(during the weeks before the strike's end) and those employees who remained on strike until the strike's end, is inherently discriminatory and unlawful under the *Erie Resistor rationale.*

The Court of Appeals' Decision

The Company elected this time to petition for review to the United States Court of Appeals for the District of Columbia. On August 13, 1982, a unanimous panel of the United States Court of Appeals issued its 28-page decision, denying the Company's petition and enforcing the Board's order in its entirety. The Court of Appeals upheld both of the alternative bases of the Board's decision, finding that there was a "proliferation of grounds for finding Banta's PRS unlawful" (Appendix A, p. 10). The Court of Appeals confirmed that the parties' Settlement Agreement had established the employees' reinstatement rights as those of unfair labor practice strikers (Appendix A, p. 14, n.8), and that the Company's systematic post-strike discrimination violated those rights (Appendix A, pp. 11-15). In addition, the Court of Appeals upheld the Board's and the Judge's alternative theory of liability, that the Company's post-strike discrimination was illegal under *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), and its progeny, regardless of whether the strikers were found to have the reinstatement rights of economic strikers or of unfair labor practice strikers (Appendix A, pp. 15-27).

THE PETITION SHOULD BE DENIED

I. The Company's Due Process Rights Were Not Violated

The Company's claim that the National Labor Relations Board based its finding of liability on allegations not included in the Complaint and not litigated at the hearing is simply false. There is absolutely no discrepancy between the statutory violations alleged in the Complaint and the ultimate findings of the Board. The Complaint specifically alleged that the Company violated Section 8(a)(3) of the Act,

29 U.S.C. § 158(a)(3), as follows (G.C. Exh. 1(e), ¶ 16; See Appendix B, p. 8):

> 16. [Banta] engaged in the following conduct on or about the dates set forth below, all of which was directed against its employees who had engaged in the strike against [Banta] until it was abandoned by the [Union] because of such employees' Union and/or other concerted activities protected by Section 7 of the Act:
>
> (a) On or about October 10, 1977, and thereafter, [Banta] granted, and continues to grant, preferential reinstatement rights or preferential seniority rights to jobs and rates of pay to those employees who had abandoned the above-described strike and who offered to or did return to work at [Banta] before the [Unions] abandoned the strike against [Banta].
>
> (b) On or about October 10, 1977, and thereafter, [Banta] denied seniority and the benefits of seniority for purposes of job assignment and computation of rates of pay to those employees who had engaged in the strike against [Banta] until abandoned by [the Unions].

In 17 full days of hearing, these *precise* allegations were exhaustively litigated: how cross-overs and strikers were reinstated; when they were reinstated; the jobs to which they were assigned and the wages they were paid; their subsequent changes in jobs and wages; the treatment of strikers' and cross-overs' seniority and other contractual rights; effects of the "preferential reinstatement system" on other terms and conditions of employment; the parties' reinstatement practices in past strikes; and the Company's purported defenses of waiver and business justification.

Based on this exhaustively developed record, Administrative Law Judge Itkin made his extensive findings of fact. *These findings and conclusions, adopted unanimously by the Board, correspond precisely with the allegations of the Complaint* (Appendix B, pp. 81, 93, footnotes omitted):

In sum, I find and conclude that Respondent violated Section 8(a)(1) and (3) of the Act by granting from on or about October 10, 1977, and thereafter, preferential reinstatement rights and preferential seniority rights to jobs and rates of pay to those employees who had abandoned the strike before strike's end and, further, by denying seniority and the benefits of seniority for purposes of job assignment and computation of rates of pay to those employees who remained on strike until strike's end.

* * * * *

Conclusions of Law

* * * * *

3. Respondent Company violated Section (8)(a)(1) and (3) of the Act by granting from on or about October 10, 1977, and thereafter, preferential reinstatement rights and preferential seniority rights to jobs and rates of pay to those employees who had abandoned the strike with the Unions (which had commenced on April 4, 1977) before the strike's end on October 8, 1977, and, further, by denying seniority and the benefits of seniority for purposes of job assignment and computation of rates of pay to those employees who remained on strike until the strike's end.

The cases cited by the Company—where the Board found violations of the Act which were neither alleged in the Complaint nor litigated at hearing—are inapposite. The Board's findings of fact and conclusions of law track the allegations of the Complaint; they were fully litigated; they are overwhelmingly supported by the record evidence.

The Administrative Law Judge, the unanimous National Labor Relations Board panel, and the unanimous Court of Appeals panel also properly rejected the Company's collateral argument that its due process rights were somehow violated when its "preferential reinstatement system" was

found to be illegal whether the strikers were considered to be unfair labor practice strikers or economic strikers.

In the first place, as set forth above, the allegations of illegality in the Complaint are unequivocal, and not dependent on any subsidiary allegations as to the strikers' status. As the Court of Appeals noted, "Nothing in the Complaint suggested that the legality of this conduct depended on whether the strike concerned unfair labor practices." (Appendix A, p. 22). In addition, all of the facts with respect to the challenged reinstatement policies, including their operation, their impact on the strikers and cross-overs, and their purported justifications by the Company, were fully litigated. As the Court of Appeals correctly found, the Company cannot claim that it was in any way prejudiced in the full presentation of its evidence (Appendix A, p. 22).

Finally, as the Court of Appeals and the Board also found, the Company had full notice of the legal arguments and theories being made in support of the allegations of the Complaint. Before the hearing began, Administrative Law Judge Itkin expressly ruled that the employees' post-strike reinstatement rights would be treated as determined by the parties' prior settlement agreement (ALJ Exh. 2; Appendix A, p. 13). This ruling was expressly concurred in by counsel for the General Counsel (ALJ Exh. 3), and was affirmed by the Board itself on the Company's interim appeal (ALJ Exh. 7). The Company's "due process" argument that it did not know that it would be held accountable for its own settlement commitments was properly rejected both as a matter of law and as a matter of fact.

The Company was also on notice of the alternative legal theory that the "preferential reinstatement system" was illegal regardless of whether the strikers were found to be unfair labor practice strikers or economic strikers. The Charging Party Union consistently advanced this legal argument from the outset in support of the Complaint's allegations. As the Court of Appeals properly ruled, "A charging party has the statutory right to 'propound theories which the

general counsel fails or refuses to rely upon,' *International Union of Electrical Workers* v. *N.L.R.B.*, 289 F.2d 757, 760 (D.C. Cir. 1960), and the ALJ and the Board are permitted to accept or reject these theories in their adjudicatory function." (Appendix A, p. 23, n.16).[5]

The findings of the Board are in full harmony with the allegations of the Complaint and were fully and fairly tried by the parties. They cannot be challenged on due process grounds.

II. The Unanimous Decisions of the Court of Appeals and the National Labor Relations Board Are Fully Compatible With Established Labor Policy

Stripped to its fundamentals, the Board's decision and order, enforced by the Court of Appeals, requires the Company not to discriminate among its pre-strike employees based on whether or not they engaged in protected activity. More specifically, the Company cannot grant superseniority among its pre-strike employees, for purposes of post-strike job assignments and wages, based on whether or not the employees remained on strike or crossed the picket line. The unanimous decisions of the National Labor Relations Board and the Court of Appeals are consistent with the policy of the National Labor Relations Act, and the decisions of this Court, including *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). Indeed, such a policy of non-discrimination is the only feasible way of complying with the central mandate of Section 7 of the Act, jointly guaranteeing the rights of

[5]The Court of Appeals also correctly held (Appendix A, pp. 25-26, n.17) that the Board and Judge did not invade the General Counsel's prosecutorial functions by determining that the Company's action was illegal precisely as alleged in the Complaint. Rather, acceptance of the Company's argument that the Board *cannot* make such findings, alleged in the Complaint and fully litigated on the record, would clearly have been an improper infringement on the Board's fundamental adjudicatory rights.

employees to engage in protected activities and not to engage in such activities.

The Company no longer challenges the Board's factual findings of massive and intentional discrimination. Its efforts to evade the legal requirement that it not discriminate should also be rejected.

The Company's attempt to analogize pre-strike employees who abandoned the strike and crossed the picket line to permanent replacements hired during a strike should be rejected.[6] In the first place, since the Board (Appendix B, pp. 2, n.4, and 52), and the Court of Appeals (Appendix A, p. 14, n.8) found that the strikers had the reinstatement rights of unfair labor practice strikers by virtue of the Board order approving the settlement agreement, the Company was prohibited as a matter of law from hiring permanent replacements for the strikers. *Mastro Plastics* v. *N.L.R.B.*, 350 U.S. 270 (1956). But even if the strikers were deemed to have the reinstatement rights of economic strikers, the Company's argument must still be rejected. An employer's claim that it could somehow "replace" one group of pre-strike employees with another group of pre-strike employees was expressly rejected in *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 230-232 (1963), as a rationale for post-strike discrimination within a pre-strike employee group. That statutory commitment to non-discrimination, mandated by Section 7, has been consistently upheld by the courts and the Board since *Erie Resistor* in both economic strikes and unfair labor practice strikes. See, e.g., *Swan Rubber Company*, 133 NLRB 375 (1961), enforced, 303 F.2d 668 (6th Cir. 1962); *Great Lakes Carbon Corporation*, 152 NLRB 988 (1965), enforced, 360 F.2d 19 (4th Cir. 1966); *Griffin Pipe Division*, 136 NLRB 1669 (1962), enforced, 320 F.2d 656 (7th Cir. 1963); *Laclede Metal Products Co.*, 144 NLRB 15 (1963); and *Rogers Manufacturing Co.*, 197

[6] It is undisputed that no permanent replacements were hired during the strike (Appendix A, p. 21; Appendix B, p. 76). The illegal discrimination in this case occurred entirely among the pre-strike employees.

NLRB 1264 (1972), enforced, 486 F.2d 644 (6th Cir. 1973), all of which involved economic strikes.

Moreover, the courts and the Board have consistently recognized that this statutory requirement of non-discrimination may require realignment of employees by neutral principles of seniority at the end of a strike, and that such realignment may necessarily result in the temporary lay-off of junior employees in favor of senior employees. *Mastro Plastics Corp.*, 103 NLRB 511, 562 (1953), enforced, 350 U.S. 270 (1956). See also *Transport, Inc. of South Dakota*, 225 NLRB 854, 863 (1976); *Lytron, Inc.*, 207 NLRB 554, 559 (1973); *Quality Limestone Products, Inc.*, 153 NLRB 1009, 1044-1045 (1965); *Laclede Metal Products Co.*, 144 NLRB 15, 30 (1963); *Swan Rubber Company*, 133 NLRB 375, 378 (1961), enforced, 303 F.2d 668 (6th Cir. 1962). To hold otherwise would clearly violate Section 7.

Finally, the Company's reliance on the decision in *Giddings & Lewis, Inc.* v. *N.L.R.B.*, 675 F.2d 926 (7th Cir. 1982), is completely misplaced. In the first place, *Giddings & Lewis* involved economic strikers. In the present case, an agreed-upon Board Order enforced by the Fourth Circuit established that the employees would have the reinstatement rights of unfair labor practice strikers, and thus could not be replaced in any event. *Giddings & Lewis* itself recognized this critical distinction. 675 F.2d at 929, n.8. In addition, *Giddings & Lewis* involved the relative rights of permanent replacements and pre-strike employees, as discussed in *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), rather than the relative rights of employees all of whom are in the pre-strike employee complement, as discussed in *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). No permanent replacements were hired in the present case.

III. The Company's Waiver Argument Was Correctly Rejected

On October 8, 1977, the Unions accepted the Company's contract offer. Acting on the unanimous vote of their membership, the Unions *rejected* the Company's "preferential reinstate-

ment system" and stated they relied on their reinstatement rights under the Act and the Settlement Stipulation and did not waive those rights (G.C. Exh. 12). Thereafter, the Company refused to implement the agreed-upon union security, dues check off and arbitration clauses of the labor contract unless the Unions signed the "preferential reinstatement system" (G.C. Exh. 13). In response to this illegal threat,[7] the Unions signed the document but expressly reserved their "right to present to the NLRB any question as to the legal reinstatement rights of the strikers which may not be effectuated by your proposed Preferential Reinstatement System" (Appendix E, p. 8). Company counsel expressly confirmed with the Union representatives that, "I understand that we have a contract now, but you are reserving the right to claim the PRS is illegal" (Tr. 1541). The Union's refusal to waive its members' rights was reiterated at every stage thereafter. The "preferential reinstatement system" was signed as a document separate from the labor agreement, with the October 10, 1977 letter of non-waiver appended (See Appendix E).

The Court of Appeals, the National Labor Relations Board, and the Administrative Law Judge correctly rejected the Company's waiver argument, both on the law and on the facts. As a matter of law, the Board and courts will not honor private settlements between employers and unions which purport to deny to employees the rights guaranteed to them by the Act. Under that legal principle, similar claims of waiver have been consistently rejected in other preferential reinstatement contexts. See, e.g., *Erie Resistor Corp.*, 132 NLRB 621, 631, n.31 (1961), remanded on this issue, 373 U.S. 221, 237 (1963), enforced on this issue, 328 F.2d 723, 726-727 (3rd Cir. 1964); *Griffin Pipe Division*, 136 NLRB 1669 (1962), enforced, 320 F.2d

[7] See, e.g., *Erie Resistor Corp.*, 132 NLRB 621, 631 (1961), enforced, 373 U.S. 221 (1963); *Griffin Pipe Division*, 136 NLRB 1669, 1673-1674 (1962), enforced, 320 F.2d 656 (7th Cir. 1963); *Rogers Manufacturing Co.*, 197 NLRB 1264, 1271 (1972), enforced, 486 F.2d 644 (6th Cir. 1973); *Philip Carey Mfg. Co.* v. *N.L.R.B.*, 331 F.2d 720, 726-728 (6th Cir. 1964), *cert. denied*, 379 U.S. 888 (1964).

656 (7th Cir. 1963); *Laclede Metal Products Co.*, 144 NLRB 15, 16 (1963); *Great Lakes Carbon Corp.*, 152 NLRB 988 (1965), enforced, 360 F.2d 19 (4th Cir. 1966). See also *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp*, 356 U.S. 342 (1958).

Moreover, as the Court of Appeals, the Board, and the Judge also found, as a matter of fact the Unions never waived their right to contest the Company's actions, but expressly reserved that right, confirmed that reservation with the Company, and have aggressively sought to enforce those rights ever since (Appendix B, pp. 79-80). The Board's factual findings of non-waiver, confirmed by the Court of Appeals, are solidly supported by the record evidence.

CONCLUSION

For the foregoing reasons, Respondent Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO, prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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